No. 87-1206-CFY
Status: GRANTED

Docketed:
January 19, 1988

Title: Kathryn Isabella Mesa and Shabbir A. Ebrahim, a/k/a Shabbir Azam, Petitioners
v.
California

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Rosenblatt,Kenneth

NOTE: Ext. of time granted on 12/10/87 by O'Connor, J., to & incl. 1/19/88 cited

Entry	Date	Note	Proceedings and Orders
1	Dec 9 1987		Application for extension of time to file petition and order granting same until January 19, 1988 (O'Connor, December 10, 1987).
2	Jan 19 1988	G	Petition for writ of certiorari filed.
4	Feb 20 1988		Waiver of right of respondent California to respond filed.
3	Feb 24 1988		DISTRIBUTED. March 18, 1988
5	Mar 14 1988	F	Response requested -- JPS.
6	Apr 4 1988		Order extending time to file response to petition until May 1, 1988.
7	Apr 28 1988		Brief of respondent California in opposition filed.
8	May 4 1988		REDISTRIBUTED. May 19, 1988
9	May 23 1988		Petition GRANTED.
			**********
11	Jul 7 1988		Order extending time to file brief of petitioner on the merits until July 21, 1988.
12	Jul 18 1988		Joint appendix filed.
13	Jul 21 1988		Brief of petitioner Kathryn Isabella Mesa, et al. filed.
15	Aug 17 1988		Order extending time to file brief of respondent on the merits until September 2, 1988.
16	Aug 25 1988		Record filed.
		*	Certified copy of original record and proceedings received.
17	Sep 2 1988		Brief of respondent California filed.
18	Sep 13 1988		CIRCULATED.
19	Sep 26 1988	G	Application (A88-247) to extend the time to file a reply brief from October 2, 1988 to October 24, 1988, submitted to Justice O'Connor.
20	Sep 27 1988		Application (A88-247) granted by Justice O'Connor extending the time to file until October 12, 1988.
21	Sep 30 1988		Set for argument. Tuesday, December 6, 1988. (2nd case) (1 hr.)
22	Oct 12 1988	X	Reply brief of petitioner California filed.
23	Dec 6 1988		ARGUED.

87-1206 No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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38 pp

QUESTION PRESENTED

Whether an employee of the United States government, charged in state court with a crime allegedly committed while performing official duties on behalf of the United States, is entitled to remove his trial to federal district court under 28 U.S.C. 1442(a)(1).

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Miscellaneous:

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* (2d ed. 1973) 5

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Kathryn Isabella Mesa and Shabbir A. Ebrahim, two employees of the United States Postal Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-20a) is reported at 813 F.2d 960. The opinions of the district court (App., *infra,* 21a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1987. A petition for rehearing was denied on October 21, 1987 (App., *infra,* 23a-24a). On December 10, 1987, Justice O'Connor extended the time within which to

file a petition for a writ of certiorari to and including January 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT

Kathryn Mesa and Shabbir Ebrahim are employees of the United States Postal Service. In separate incidents each was involved in a collision while driving a United States Postal Service vehicle in the course of delivering the United States mail. Petitioner Mesa struck a bicyclist who was killed. She was charged in California state court with vehicular homicide. Petitioner Ebrahim was struck by a police car and was charged by the officer with speeding and failure to yield.

The United States Department of Justice is representing both petitioners. See 28 C.F.R. 50.15(a). Pursuant to 28 U.S.C. 1442(a)(1), petitioners filed removal petitions in the United States District Court for the Northern District of California. The district court granted the petitions and denied motions by the State of California to remand the

cases to state court. Prior to trial, the State filed a consolidated appeal to the Ninth Circuit Court of Appeals challenging the denial of the state's remand motions. Petitioners challenged the appealability of the district court's decisions denying remand, but the court of appeals held that, although the State could not bring an interlocutory appeal, the court nonetheless had jurisdiction to issue a writ of mandamus to order the cases remanded to state court. See *Maryland* v. *Soper (No. 1)*, 270 U.S. 9, 29-30 (1926).[1]

On the merits, a divided panel of the court of appeals held that allegations that petitioners were performing their duties as federal officers at the time and place of the alleged criminal conduct did not satisfy the "color of office" requirement of 28 U.S.C. 1442(a)(1). The court stated (App., *infra*, 10a) that the primary purpose of the removal statute was to permit a federal official with a federal defense to litigate that defense in federal court. Petitioners have raised no federal defense, the court noted, and their cases therefore turn entirely on issues of state law. While acknowledging (App., *infra*, 13a) that a desire "to permit trial on state-law claims free from local prejudice against federal interests * * * certainly played a role in the evolution of section 1442(a)(1)," the court nonetheless concluded (App., *infra*, 11a) that "[t]he attenuated federal interest in ensuring that [petitioners'] trial be unbiased does not justify an invasion of the state's authority to police its streets."

The court of appeals acknowledged (App., *infra*, 11a) that this Court had "read the 'color of office' provision of 28 U.S.C. § 1442(a)(1) quite broadly" in *Willingham* v. *Morgan*, 395 U.S. 402 (1969), and held there that removal was appropriate based simply on "the undisputed fact that

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[1] Petitioners do not seek certiorari on this aspect of the court of appeals' decision.

petitioners were on duty, at their place of federal employment, at all the relevant times" (*id.* at 409). The court of appeals noted, however, that *Willingham* was a civil case and declined to "casually import[]" that reading of the statute "into the criminal arena." Stressing "the states' compelling interest in the administration of their criminal justice systems," the court concluded that "federal postal workers may not remove state criminal prosecutions to federal court when they raise no colorable claim of federal immunity or other federal defense" (App., *infra,* 14a). The court therefore issued the writ of mandamus ordering the district court to remand the two prosecutions for trial in the California state courts.

Judge Noonan dissented, concluding that the "unusually spacious" language of the statute was not to be given such a restricted reading. "It is not a requirement for removal," he stated, "that the employee have a federal defense to the charges. * * * The federal employee charged with a crime for an act done in the course of his employment and entirely innocent of any unlawful act whatsoever has no 'federal defense.' His defense is, 'I did not do the unlawful act complained of.' The removal statute reflects no intention on the part of Congress to deny such an entirely innocent employee the benefits of a federal forum." App., *infra,* 18a.

Judge Noonan noted that "[i]t is no derogation of any existing state sovereignty when the national government exercises its own authority to create a federal forum in which the acts of its agents will be measured" (App., *infra,* 17a). He therefore rejected the majority's use of separate standards for removal in criminal and civil cases. "In the removal statute Congress has made no differentiation between 'civil actions' and 'criminal prosecutions.' * * * A court should not distinguish where Congress in the exercise of its constitutional power has drawn no line" (*ibid.*). Judge Noonan therefore concluded that "under color of

office" is properly read in both types of cases as "the equivalent of 'within the scope of their employment' " (*id.* at 16a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case is inconsistent with the plain terms of Section 1442(a)(1), and is in direct conflict with *Pennsylvania* v. *Newcomer,* 618 F.2d 246 (1980), in which the Third Circuit held that a federal defense is not required for removal of a criminal prosecution. Further, the decision below contravenes the clear purpose of Section 1442(a)(1), as explained by this Court in a series of decisions spanning 100 years, and would permit states, through the prosecution of federal officers performing their official duties, to undermine federal policies and programs. Accordingly, review by this Court is warranted.

1. Section 1442(a)(1) is written in "sweeping terms." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1335 (2d ed. 1973). It permits removal of "[a] civil action or criminal prosecution" by "[a]ny officer of the United States" for "any act under color of such office." This Court has stressed that the words of the statute are not to be given "a narrow, grudging interpretation" (*Willingham* v. *Morgan,* 395 U.S. at 407). Accordingly, the Court has stated that removal is appropriate whenever there is a "causal connection" between the charged conduct and the performance of the defendant's official duties (*id.* at 409; *Soper (No. 1),* 270 U.S. at 33). In a suit by a prisoner against the warden and chief medical officer of a federal penitentiary, this Court found sufficient "causal connection" in the fact that the defendants' only contact with the prisoner had been in performance of their official duties. "The connection consists, simply enough, of the undisputed fact that [defendants] were on duty, at their place

of federal employment, at all the relevant times" (*Willingham*, 395 U.S. at 409).

Under the test applied in *Willingham*, petitioners are clearly entitled to removal. The events in question occurred while they were driving their mail trucks in the course of delivering the United States mail. Accordingly, as in *Willingham*, petitioners were "on duty, at their place of federal employment, at all the relevant times." There is no persuasive basis, we submit, for applying a different test on the ground that this is a criminal case. It is true that the Court in *Willingham* noted in passing that "a more detailed showing *might* be necessary" in a criminal case "because of the more compelling state interest in conducting criminal trials in the state courts" (395 U.S. at 409 n.4 (emphasis added)). As Judge Noonan noted, however, there is no justification in the language of the statute for such a distinction.

Section 1442(a)(1) states simply that "[a] civil action or criminal prosecution * * * may be removed" and then proceeds to state a single test governing all cases. The phrase "under color of office" cannot plausibly be read to mean different things for different cases. "A court should not distinguish where Congress in the exercise of its constitutional power has drawn no line" (App., *infra*, 17a). While this Court's decisions on the removal of state criminal actions against federal officials do not speak with one voice,[2] on balance they support a construction of the statute in accordance with its obvious meaning.

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[2] There is language in both *Arizona* v. *Manypenny*, 451 U.S. 232 (1981), and *Maryland* v. *Soper (No. 1)*, 270 U.S. 9 (1926), that appears to support the court of appeals' ruling that a federal defense is required for removal. See, *e.g.*, 451 U.S. at 241 ("Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties"); 270 U.S. at 34 ("The defense [the federal official] is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based"). We submit, however, that each of these decisions, read in its entirety, is wholly consistent with a construction of the statute allowing removal of prosecutions concerning acts committed while performing official duties.

In upholding the constitutionality of a predecessor of Section 1442(a)(1) in *Tennessee* v. *Davis*, 100 U.S. 257, 265 (1880), this Court stated quite clearly that the reasons for removal "are equally applicable to both" civil suits and criminal prosecutions. The Court found "no room for reasonable doubt" that the removal statute applied to a murder prosecution brought against a revenue collector who claimed that he killed in self-defense while engaged in the discharge of his duties (*id.* at 261), even though self-defense is a state rather than a federal defense to a murder charge. "Such is [the statute's] positive language," the Court explained, "and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State" (*id.* at 262).

More recently, in *Arizona* v. *Manypenny*, 451 U.S. 232 (1981), the Court assumed the propriety of removing to federal court a state assault prosecution against a Border Patrol agent on the ground that "the charge arose from an act committed while on duty for the INS" (451 U.S. at 235). While the removal itself was not challenged before this Court, it is noteworthy that the Court articulated a standard for removal indistinguishable from that set forth in *Willingham*, and at no point suggested that a more stringent standard might be justified because a criminal case was involved. See also *Soper (No. 1)*, 270 U.S. at 32-33 (defendant need not admit that he actually committed the charged offense in order to obtain removal; removal available even to officer who denies any relationship to the charged offense).

2. The Ninth Circuit's decision creates a direct conflict with the decision of the Third Circuit in *Pennsylvania* v. *Newcomer*. The court below frankly acknowledged that it was "part[ing] company with the Third Circuit, which allowed removal by a federal postal worker under facts indistinguishable from the cases at bar" (App., *infra*, 12a n.13). In *Newcomer*, a postal worker involved in a traffic accident while driving on his mail route was charged in state court with vehicular homicide. The employee removed the charge to federal court pursuant to Section 1442(a)(1). The State contended, as the Ninth Circuit held here, that removal is only appropriate where the employee alleges a "federal defense" to the criminal charges against him. The Third Circuit, however, reviewed the history of the removal statute and this Court's construction of the statute, and concluded that allegations of a federal defense were not essential for removal. 618 F.2d at 250. See also *Stein-Sapir* v. *Birdsell*, 673 F.2d 165 (6th Cir. 1982) (holding, in reliance on Third Circuit's decision in *Newcomer*, that no federal defense is required to support removal in civil cases).

The Ninth Circuit's decision also conflicts with *City of Aurora* v. *Erwin*, 706 F.2d 295 (10th Cir. 1983), which sustained removal of a simple battery charge against a postal employee who, while delivering the mail, had sprayed a postal patron with dog repellant. The postal employee did not present a "federal defense," but the test for removal formulated by the Tenth Circuit contained no such requirement. "Section 1442(a)(1)," the court stated (*id.* at 296), "grants a right of removal to federal officers who face litigation in state court as a result of action taken in the course of their official duties."[3]

[3] Although the removal issue does not appear to have been raised by the State in *City of Aurora*, which was heard on an appeal by the defendant following his conviction, the propriety of the removal is a jurisdictional question. Since subject matter jurisdiction is not waivable, the Tenth Circuit's treatment of the removal question is essential to its decision and therefore not dicta.

3. As this Court explained in *Willingham* (395 U.S. at 405-406), the predecessors of Section 1442(a)(1) date from 1815 and were designed to prevent state interference with the enforcement of federal customs statutes and revenue laws. Congress extended the removal provision to cover all federal officers in 1948. "The purpose of all these enactments is not hard to discern" (*Willingham*, 395 U.S. at 406). This Court explained both the purpose and the constitutional justification for removal in *Soper (No. 1)*, 270 U.S. at 32: "The constitutional validity of the section rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice, by state prosecutions instituted against federal officers in enforcing such laws, by removal of the prosecutions to a federal court to avoid the effect of such prejudice." See also *Willingham*, 395 U.S. at 405 ("the removal provision was an attempt to protect federal officers from interference by hostile state courts"); *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932); *Tennessee* v. *Davis*, 100 U.S. at 263.

As the Third Circuit stated in *Newcomer* (618 F.2d at 250), "[t]he original removal statutes were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of the federal government by the state." The Ninth Circuit's decision, which makes a "federal defense" a prerequisite to removal, thus defeats the primary purpose of the removal statute. It denies removal to a federal official charged in a state criminal action, where his defense does not raise an issue of federal law. Congress clearly intended to allow such an official to have his "trial upon the merits of the state-law question free from local interests or prejudice" (*Manypenny*, 451 U.S. at 242). By frustrating

this intent, the decision below presents a potential threat to federal supremacy anywhere federal policies encounter local hostility.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1988

[4] The court of appeals, at several points in its opinion, acted as if its decision were limited to postal worker traffic cases. For example, the court stated (App., *infra*, 13a) that "[t]here is simply no reason to believe that, on a systematic basis, postal workers will not get a fair shake in state court." See also *id.* at 14a ("Congress could not have intended 28 U.S.C. § 1442(a)(1) to turn the federal courts into a special traffic court for federal employees"); *ibid.* (noting that "the overcrowded district courts" should not be troubled with such "pesky cases").

The court intimated (App., *infra*, 13a) that if there were an allegation that the state was bringing a prosecution "to frustrate or impede the performance of federal duties," then "a different, and more difficult, case" for removal would be presented. But the court fails utterly to explain how such a possibility is left open by its ruling. If a federal official's only defense to a state criminal charge is that he did not do whatever it is the state is charging him with, the Ninth Circuit's ruling would preclude removal even in the face of clear evidence that the state is deliberately attempting to thwart federal policy by bringing the case. The ruling of the court of appeals cannot be limited to "pesky" postal cases.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1525
D.C. No. CR 85-2149-RPA

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF-APPELLANT

v.

KATHRYN ISABELLA MESA, DEFENDANT-APPELLEE

No. 86-1500
D.C. No. CR 85-2135-RPA

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF-APPELLANT

v.

SHABBIR A. EBRAHIM, a/k/a SHABBIR AZAM,
DEFENDANT-APPELLEE

Petitions from the United States District Court
for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

Argued and Submitted
January 13, 1987—San Francisco, California

[Filed Mar. 26, 1987]

Before: CHARLES M. MERRILL, DOROTHY W. NELSON and JOHN T. NOONAN, JR., Circuit Judges.

OPINION

MERRILL, Circuit Judge:

These two cases[1] pose a fascinating issue of federalism: can a federal postal employee remove his state criminal prosecution to federal court when no issue of federal law will arise at trial and when the only federal component of the case is that he was on duty when the relevant acts allegedly occurred?

Mesa and Ebrahim are United States mail carriers charged with violations of state law[2] that allegedly occurred while they were on duty driving their mail trucks. Both defendants removed their cases to federal court pursuant to 28 U.S.C. § 1442(a)(1), which allows removal by federal officers acting "under color of [their] office."[3] The district court denied California's motions to remand the cases to state court. Although neither defendant has yet been tried in federal court, California asks this court—either by way of interlocutory appeal or a writ of man-

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[1] Because they raise the same legal issues, we order that these two cases be consolidated on appeal.

[2] Mesa was accused of misdemeanor-manslaughter after her mail truck collided with and killed a bicyclist. Ebrahim received a traffic ticket for speeding and failing to yield after his mail truck collided with a police car.

[3] In pertinent part, the statute states:

> **§ 1442. Federal officers sued or prosecuted**
>
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to [federal district court]:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1) (1982).

damus—to order the cases remanded to state court. We find that the collateral order doctrine does not permit interlocutory review in these cases. Rather, we hold that a writ of mandamus is appropriate to compel the district court to remand these cases to state court.

I. COLLATERAL ORDER DOCTRINE

This court's appellate jurisdiction is generally limited to review of "final decisions of the district courts." 28 U.S.C. § 1291. The collateral order doctrine, established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is a narrow exception to the final judgment rule. In criminal cases, the exception permits appeal of interlocutory orders that satisfy three requirements. First, the order must " 'constitute[] a complete, formal, and, in the trial court, final rejection of the claim the order addresses." *United States v. Harper*, 729 F.2d 1216, 1220 (9th Cir. 1984) (quoting *Abney v. United States*, 431 U.S. 651, 659 (1977)). Second, the claim must be " 'collateral to and separable from' " the issue of the defendant's guilt. *Id.* And third, the order must involve rights that "would be irretrievably lost if review were postponed until trial is completed." *Flanagan v. United States*, 465 U.S. 259, 266 (1984). The Supreme Court has interpreted the collateral order doctrine with the "utmost strictness" in criminal cases. *Id.* at 265.[4]

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[4] The Supreme Court has found three kinds of orders appealable under the collateral order doctrine as applied in criminal cases. *See Helstoki v. Meanor*, 442 U.S. 500 (1979) (reviewing before trial a Congressman's right under the Speech and Debate Clause not to be questioned about certain legislative activities); *Abney v. United States*, 431 U.S. 651 (1977) (reviewing before trial a defendant's right not to be tried in violation of the Double Jeopardy Clause); *Stack v. Boyle*, 342 U.S. 1 (1951) (reviewing Eighth Amendment claim of excessive bail, which would become moot after trial); *accord United States v. Claiborne*, 727 F.2d 842 (9th Cir.) (allowing direct appeal by federal

Although the orders at issue here clearly satisfy the second requirement, the first and third requirements are not met. First, the order denying the motions to remand to state court are not final rejections of the state's request for remand because 28 U.S.C. § 1447(c) (1982) provides that the district court shall remand the case "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." Hence, the district court's initial decisions to deny the motions did not preclude the possibility of a remand. In addition, the third requirement is not clearly met because, as is discussed more fully in the following section, the state may appeal an acquittal on the ground that the case was improperly removed. Therefore, review of the denial of the motions to remand under the collateral order doctrine is inappropriate in these cases.

II. MANDAMUS

This court has the power to issue a writ of mandamus in aid of its appellate jurisdiction. *See Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 25 (1943); 28 U.S.C § 1651 (1982). That power unquestionably exists here, because this court would have jurisdiction over appeals from final judgments in these cases. *See United States v. Harper,* 729 F.2d 1216, 1221 (9th Cir. 1984).

Because of the strong policy against piecemeal review embodied in the final judgement rule (particularly in criminal cases), the question is whether discretionary review by way of a writ of mandamus is appropriate. As a general matter, the Supreme Court has described the writ as "an 'extraordinary remedy' that should only be invoked in 'exceptional circumstances.'" *Id.* (quoting *Will v. United States,* 389 U.S. 90, 95 (1967)).

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judge arguing that he had a right not to be tried for tax evasion until constitutionally removed from office), *cert. denied,* 469 U.S. 829 (1984).

Nonetheless, the Supreme Court has approved appellate grants of mandamus in cases very similar to those before us. In *Maryland v. Soper (No.1),* 270 U.S. 9 (1926), four prohibition agents and their chauffeur sought to remove their state murder prosecutions to federal court under a statutory predecessor of 28 U.S.C. § 1442, and the district judge denied Maryland's motion to quash the petition for removal. Under these "exceptional circumstances," *id.* at 30, the Supreme Court held that mandamus was appropriate because of the delicate issue of federal-state relations raised: "the jurisdiction of the courts of a State to try offenses against its own laws and in violation of its own peace and dignity is wrested from it by the order of an inferior federal court." *Id.* at 29; *cf. Kollsman v. City of Los Angeles,* 737 F.2d 830, 833 n.5 (9th cir. 1984) (noting that a district court's decision not to abstain under the *Pullman* doctrine is reviewable through mandamus), *cert. denied,* 469 U.S. 1211 (1985). The Court also noted that mandamus was the only procedure whereby the state could obtain appellate review. *See Soper,* 270 U.S. at 30. In other cases, the Supreme Court has taken a similar approach to mandamus in criminal removal cases. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 31 n.5 (1943); *Colorado v. Symes,* 286 U.S. 510 (1932) (following *Soper (No. 1)*); *accord Pennsylvania v. Newcomer,* 618 F.2d 246, 248-49 (3rd Cir. 1980): *cf. Virginia v. Rives,* 100 U.S. 313 (1879) (issuing writ of mandamus to review removal under civil rights removal statute).

The crux of these authorities—that federalism concerns justify review by mandamus—applies directly to the cases before us. California's jurisdiction to try traffic infractions and misdemeanor-manslaughter charges has been "wrested" from it by the district court's orders. There is an argument, however, that the force of these early Supreme Court decisions has been partially deflected by its decision in *Arizona v. Manypenny,* 451 U.S. 232 (1981), which,

together with authorizing state law, would permit an appeal by the state after an acquittal in federal court if the case was improperly removed to federal court.[5] Thus, mandamus may not be the only procedure whereby California could obtain appellate review of the propriety of the removals.

We find that the limited availability of post-trial review of the removals does not deprive these cases of the exceptional character necessary for mandamus relief. Under *Manypenny* and pertinent state law, California will be able to appeal an acquittal on the grounds that the defendant improperly removed his prosecution to federal court. Yet if the postal workers are convicted in federal court, California will be in an odd position. California could let the convictions stand, but then its asserted right to try the defendants in its own courts would remain unfulfilled. To vindicate this sovereign right, California might appeal the federal court convictions in order to be able to retry the defendants in its own courts. But it would seem perverse to require the state to prosecute in federal court only so it can have its convictions reversed on appeal.[6] Mandamus is appropriate to avoid this awkward result.

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[5] In determining whether a state can appeal an acquittal in a state prosecution removed to federal court, we look to state law. *See Arizona v. Manypenny*, 451 U.S. 232, 250 (1981). Under California law, the state can appeal an aquittal if double jeopardy would not bar retrial. *See* Cal. Penal Code § 1238(a)(8) (West 1982). Under both federal and California law, jeopardy does not attach if the trial court lacked subject matter jurisdiction. *See Schlang v. Heard*, 691 F.2d 796, 798 (5th Cir. 1982) (applying federal law), *cert. denied*, 461 U.S. 951 (1983); *People v. Shanea*, 150 Cal. App. 3d 831, 840-44 & n.12, 198 Cal. Rptr. 228, 233-36 & n.12 (1984) (applying federal and California law).

[6] And it would be similarly perverse to expect the defendants to attack their convictions on the ground that federal removal was improper. After all, it is they who now strenuously urge the propriety of the removals.

Moreover, after the great expenditure of judicial resources necessary to try and acquit a defendant in federal court, an appellate court may well be reluctant to second-guess the district court's decision concerning the often close question of the propriety of removal under the "under color of" requirement. In addition, although the defendant may be said to have brought this situation upon himself by removing to federal court in the first place, the appellate court may nonetheless cautiously approach the prospect of putting him through the ordeal of trial a second time, even if jeopardy technically would not have attached in the federal trial. *See Green v. United States*, 355 U.S. 184. 187-88 (1957). These practical considerations may tend to erode the state's ability to protect its interest in trying defendants in state court. Finally, another argument in favor of mandamus is that the cases raise "new and important problems" and "issues of first impression" that warrant extraordinary treatment. *Harper* 729 F.2d at 1222.

III. REMOVAL

A. The Federal Officer Removal Statute and Its History

The removal issue in these cases cannot be properly understood without at least a quick glimpse at the history of the federal officer removal statute, currently codified at 28 U.S.C. § 1442(a)(1).[7] The earliest such removal provision was enacted as part of the federal reaction to New

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[7] For more detailed discussions of the history of the statute, see *Willingham v. Morgan*, 395 U.S. 402, 405-06 (1969); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 1335-38 (2d ed. 1973) [hereinafter *Hart & Wechsler*]; Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 805-10 (1965).

England's opposition to the trade embargo declared during the War of 1812. The statute, which granted customs officials authority to board vessels in order to collect duties, allowed those officials to remove state court civil suits or prosecutions "for any thing done by virtue of this act or under colour thereof." *See* Act of Feb. 4, 1815 § 8, 3 Stat. 195, 198.

Although the 1815 removal provision was of limited duration. Congress enacted a permanent version in 1833 as part of the "Force Bill," enacted in response to South Carolina's Nullification Act – an attempt to make enforcement of federal customs law a state crime. During the 1860's, the "Force Bill" was extended to protect federal officials enforcing the revenue laws in addition to the customs laws. The next development came during the Civil War, when Congress enacted a broad, although temporary, statute allowing removal of civil and criminal cases based on acts justified under the authority of the President or Congress. Finally, in 1948 the statute was broadened further to the language currently contained in 28 U.S.C. § 1442(a)(1).

Several aspects of the federal officer removal statute's pedigree are worth noting. Throughout the statute's history, Congress balanced the perceived federal interests of the time against the states' traditional right to enforce their criminal laws in their own courts. Congress never allowed federal officers – merely because of their federal status – to remove all state court cases in which they were sued or prosecuted. Rather, the right to remove generally came as part and parcel of a larger package of federal substantive law expected to encounter hostility in the state courts. And the federal officers could only remove prosecutions based upon acts done "under color of" their federal authority. The final broadening of the statute in 1984 retained the same "under color of " language present all along, suggesting that a similar balance between state

sovereignty and federal interests had been struck, but with application to a wider range of federal substantive law.

B. The Scope of the "Under Color of Office" Requirement

The delicate balance between federal and state interests examined in the historical context above comes to the fore in the two cases before us today. Although 28 U.S.C. § 1442(a)(1) has been described as "sweeping" in its breadth. *Hart & Wechsler, supra* note 7, at 1335, and the Supreme Court upheld its constitutionality with broad strokes of federal supremacy, *see Tennessee v. Davis,* 100 U.S. 257, 263 (1879), no authority binding on this court has ever construed the criminal removal provision as broadly as the district court did in these cases, which implicate no issue of federal law.

The leading Supreme Court decision interpreting the breadth of the criminal removal provision *Maryland v. Soper (No.1),* 270 U.S. 9 (1926), insisted that the federal officers seeking removal demonstrate "a causal connection between what the officer has done under asserted official authority and the state prosecution." *Id.* at 33. Federal prohibition agents had "discovered a man . . . mortally wounded and lying beside the path along which they were walking" during an investigation. *Id.* at 24. The Court held that the pleadings had not established a sufficient basis for removal of their state murder prosecutions because the "averments amount to hardly more than to say that the [alleged] homicide . . . was at a time when they were engaged in performing their official duties." *Id.* at 35. A proper removal petition would have to allege that "what he did was justified by his duty under the federal law and [that] he did nothing else on which the prosecution could be based." *Id.* at 34; *see Colorado v. Symes,* 286 U.S. 510. 519 (1932).

Under the rule of *Soper (No. 1),* removal of the state criminal prosecutions at bar is inappropriate. The removal

petition in *Mesa* alleges only that her allegedly illegal acts occurred while defendant was on duty and acting in the course and scope of her employment with the Postal Service." Ebrahim alleges that his state charges arose from an accident "which occurred while defendant was on duty." Neither petition shows a sufficient "causal connection" between their duties as mail carriers and the allegedly negligent driving upon which their prosecutions rest. *Cf. Goldfarb v. Miller,* 181 F. Supp. 41, 47 (D.N.J. 1959) (denying removal of tort suit against a mail truck driver because there was no "official connection between the act complained of and [the officer's] official duties").

As in *Soper (No. 1),* the removal petitions here do not allege that the acts complained of were justified by the officers' duties under federal law. There is no colorable claim that federal immunity[8] protects the officials' acts, as there was when a federal officer received a speeding ticket while hurrying to stage a raid on a suspected illegal still. *See City of Norfolk v. McFarland,* 143 F. Supp. 587 (E.D. Va. 1956).[9] There is no effort on the state's part to criminalize activity important to federal interests, as there

[8] The doctrine of federal immunity insulates a federal officer from state prosecution if the officer's acts "are both (1) authorized by the laws of the United States and (2) necessary and proper to the execution of his responsibilities." *Morgan v. California,* 743 F.2d 728, 731, 733 (9th Cir. 1984) (holding that the defendant had not "demonstrated how it would be necessary and proper for him to drive while under the influence in order to carry out his federal duty of meeting with an informant"); *see In re Neagle,* 135 U.S. 1, 75 (1890).

[9] Similarly, in *Tennessee v. Davis,* the federal tax collector permitted by the Court to remove his state murder prosecution alleged that his acts of self-defense were done "under the authority of the internal-revenue laws of the United States." 100 U.S. at 261. The Court phrased the question before it as whether article III permitted the removal at issue before trial "when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein." *Id.* at 262.

was during the War of 1812 and Civil War eras. In short, the prosecutions of Mesa and Ebrahim turn completely on issues of state law. The attenuated federal interest in ensuring that their trial be unbiased does not justify an invasion of the state's authority to police its streets.

The postal workers rely heavily on a more recent Supreme Court decision, *Willingham v. Morgan,* 395 U.S. 402 (1969). In *Willingham,* the Court read the "color of office" provision of 28 U.S.C. § 1442(a)(1) quite broadly in the civil context. Thus it allowed federal prison officials to remove a damage suit brought by a prisoner who alleged that they had physically abused him in a penitentiary. The Court held that the removal petition had established the requisite " 'causal connection,' " which "consist[ed], simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times." *Id.* at 409 (*quoting Soper (No. 1),* 270 U.S. at 33).

Citing *Willingham,* the postal workers argue that "on duty" satisfies "under color of office." This argument, however, reads too much into *Willingham.* First of all, the officers in that case had raised a colorable claim of official immunity. *See id.* at 405, 409. In fact, Justice Marshall, writing for the Court, noted that "[o]ne of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts." *Id.* at 407. Here, no federal defense can justify removal.

Second, Justice Marshall drew a sharp distinction between removal in civil cases like *Willingham* and removal of criminal prosecutions: "[w]ere this a criminal case, a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts." *Id.* at 409 n.4.[10] Indeed, removal of

[10] *See Virginia v. Harvey,* 571 F. Supp. 464 (E.D. Va. 1983) (noting *Willingham's* distinction between civil and criminal removals and

state criminal prosecutions constitutes a far greater disruption of legitimate state authority than removal of state law civil suits against federal officials.[11] Under the diversity jurisdiction, federal courts have long entertained civil suits turning solely on state substantive law. Furthermore, in criminal suits the state itself is a party; removal forces the state to enforce its own laws in an alien forum. And finally, a polity's ability to protect its citizens from violence and other breaches of the peace through enforcement of criminal laws is the centermost pillar of sovereignty.[12] Thus, *Willingham's* broad reading of "under color of office" cannot be casually imported into the criminal arena.[13]

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holding that driving from one military post to another under orders was not sufficiently connected to an officer's federal duties to warrant removal of his involuntary manslaughter prosecution).

[11] The dissent seems to disagree, finding it "anomalous" that Congress would provide, in 28 U.S.C. § 1346(b), exclusive federal jurisdiction for torts suits arising from the alleged negligent driving of postal employees, yet would relegate state criminal prosecutions based on the same conduct to state court. *Post*, at p. ____. But 28 U.S.C. § 1346(b) is limited to damage actions "against the United States." Where federal funds are at stake, federal jurisdiction is clearly appropriate. It is no anomaly, then, to deny federal jurisdiction to Mesa and Ebrahim, whose prosecutions do not expose the federal government to potential damage liability.

[12] *See generally Younger v. Harris*, 401 U.S. 37, 46 (1971) (dissolving injunction against pending state prosecution because of "the fundamental policy against federal interference with state criminal prosecutions"); *id.* at 55 n.2 (Stewart, J., concurring) ("A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law."); *Colorado v. Symes*, 286 U.S. 510, 518 (1932); *Oklahoma v. Willingham*, 143 F. Supp. 445, 448 (E.D. Okla. 1956).

[13] This is where we part company with the Third Circuit, which allowed removal by a federal postal worker under facts indistinguishable from the cases at bar. In *Pennsylvania v. Newcomer*, 618 F.2d 246, 249-50 (3rd Cir. 1980), the Third Circuit relied directly

C. Policy considerations

The postal workers seek to justify this federal interference with state authority through two policy arguments. First, they cite scattered statements in the case law indicating that besides providing federal officers a federal forum to adjudicate their federal defenses, the federal officer removal provision was designed to permit trial on state-law claims free from local prejudice against federal interests. *See, e.g., Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981). Although a fear of state court prejudice certainly played a role in the evolution of section 1442(a)(1), the Supreme Court has never indicated that this interest alone would justify removal of a state criminal prosecution. Moreover, this federal interest would be more compelling in the context of civil rights law or some realm of federal authority likely to encounter antagonism in state court. *See generally Stauder v. West Virginia*, 100 U.S. 303, 310-12 (1879); 28 U.S.C. § 1443; Amsterdam, *supra* note 7. There is simply no reason to believe that, on a systematic basis, postal workers will not get a fair shake in state court.

The second policy argument set forth in favor of federal removal is a fear "that local officials might use 'petty' offenses such as traffic tickets, trespass or assault charges in a collateral effort to hinder and intimidate federal officials in the performance of their assigned federal duties." This argument assumes, however, that state courts would cooperate with such a ploy by local police. The removal petitions at issue here contain no allegation of a pattern of enforcement discriminating against federal officers, or even of a single prosecution motivated by a desire to frustrate or impede the performance of federal duties. Allegations of this sort would establish a different, and more difficult, case.

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on *Willingham*, ignoring the Court's distinction between removal of civil suits and criminal prosecutions.

Practical considerations militate against construing the removal statute as broadly as the district court did here. Congress could not have intended 28 U.S.C. § 1442(a)(1) to turn the federal courts into a special traffic court for federal employees. Whatever remote federal interests are implicated by state traffic regulation of postal vehicles, the overcrowded district courts do not need a new category of pesky cases turning solely on state law. The cost and inconvenience to the state of enforcing petty traffic infractions (only to receive nominal fines) and driving misdemeanors in federal court may lead them to curtail, or even forgo, prosecution of these offenses when committed by federal postal workers. We do not believe that Congress intended the federal officer removal statute to infringe so drastically upon the states' ability to keep their neighborhood streets safe.

IV. CONCLUSION

A federal officer's acts performed while on duty are not automatically done "under color of [federal] office." 28 U.S.C. § 1442(a)(1). Because of the states' compelling interest in the administration of their criminal justice systems, we hold that federal postal workers may not remove state criminal prosecutions to federal court when they raise no colorable claim of federal immunity or other federal defense.

A writ of mandamus is hereby GRANTED. The district court is ordered to DENY the petitions for removal and to REMAND these two prosecutions for trial in the California state courts.

NOONAN, Circuit Judge, dissenting:

We are called to interpret an act of Congress. The act provides that "a civil action or a criminal prosecution" brought "against any officer of the United States . . . or person acting under him, for any act under color of such office" may be removed by the defendants from the state to the federal court. 62 Stat. 938 (1984), 28 U.S.C. § 1442(a)(1).

The statute embraces not only "officers of the United States" but all their subordinates, officers or not. The head of every federal department or agency is an officer of the United States. Those acting under him are themeselves officers or they are employees. Officers or employees, they are within the statute; they are acting under an officer of the United States. All federal employees fall within the class described. Inclusiveness to this degree was the intention of the revisers when the Judicial Code was changed in 1984. The "Reviser's note" declared sweepingly: "The revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof." 28 U.S.C. Ann. § 1442. "Historical and Revision Note."

The extent of the change in 1948 rendered superfluous parts of earlier law that were still retained – e.g. 28 U.S.C. §§ 1442(a)(3) providing for removal of suits against any officer of a court "for any act under color of office or in the performance of his duties." The court officer was already covered by (a)(1). But section (a)(3) was allowed to remain as historical "residue" of a long series of specialized removal statutes that preceded the present (a)(1). See Hart and Wechsler, *The Federal Courts and the Federal System* (ed. Bator, Mishkin, Shapiro and Wechsler, 1972) 1336.

The "breadth of the language," *id.*, makes the phrase "under color of such office" unusually spacious. The phrase "act under color of office" suggests action by an

officer of the goverment. In the context of this statute, the phrase goes further. It necessarily includes—because the statute includes—acts by any employee—a janitor, say, or a guard, or a driver—who would not be classified as an officer. Expansively read as it must be to afford protection to all federal employees, "under color of such office" is the equivalent of "within the scope of their employment."

The statute instructs us that a suit against a federal employee based on an act within the scope of his employment may be removed to a federal forum. No challenge is here raised to the constitutionality of the statute, and none could be. The "judicial Power" of the United States extends to all cases "arising under this Constitution, the laws of the United States . . . " Constitution of the United States, Article III, § 2. A case based on the act of a federal employee acting within the scope of his employment arises under the Constitution, which creates the authority to authorize his work, and under the laws of the United States that do authorize it, that make him a federal employee within a federal program with a federal function. *Cf. Osborn v. Bank of the United States,* 9 Wheat. (22 U.S.) 738, 823 (1824).

The history of the removal statute is of course relevant to its reading. Undoubtedly the motivation of Congress in enacting many past provisions for removal was the fear of local hostility to federal policy. *See Maryland v. Soper* (No. 1), 270 U.S. 9 at 32 (1926). Congressional motivation should not be mistaken for congressional power. The power exists in Congress to provide a federal forum for all federal agents engaged in federal work. See Mishkin, "The Federal 'Question' in the District Courts", 53 Col. L. Rev. 157, 193 (1953).

Congress has chosen to vest the "judicial Power" in the federal courts to decide suits against federal employees for acts within the scope of their employment. Removal is at the discretion of the employees sued: the case, the statute

says, "may" be removed "by them." But if removal is sought by the employee, the acceptance of jurisdiction of the case is mandatory. Congress, not the lower federal courts, determines the jurisdiction of these courts. Constitution of the United States, Article III, § 1. Congress has ordained and established that jurisdiction of such suits against federal employees vests in the federal system.

The removal statute as to civil actions is in harmony with the Federal Tort Claims Act, one of whose "principal purposes was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal Service were at fault." *Kosak v. United States,* 465 U.S. 848, 855 (1984). Claims against the United States for the negligent acts of postal employees, as of other federal employees, are within the exclusive jurisdiction of the district court. 28 U.S.C. § 1346(b).

It would be anomalous, to say the least, that Congress wanted tort suits arising out of allegations of negligent driving by postal employees tried in the district court but criminal prosecutions based on the same conduct tried in the state courts. A footnote in a recent case does suggest that there is a graver invasion of state sovereignty when a state is denied the right to prosecute a state crime in a state court. *Willingham v. Morgan,* 395 U.S. 402 at 409, n.4. This suggestion was answered long ago; a portion of state sovereignty was surrendered, when the Union was formed, to the United States. It is no derogation of any existing state sovereignty when the national government exercises its own authority to create a federal forum in which the acts of its agents will be measured. *Tennessee v. Davis,* 100 U.S. 257, 267 (1880). In the removal statute Congress has made no differentiation between "civil actions" and "criminal prosecutions." In the same breath, Congress has provided for the removal of both. A court should not distinguish where Congress in the exercise of its constitutional power has drawn no line.

It is not a requirement for removal that the employee have a federal defense to the charges. Language in some cases does suggest that there must be such a defense. *Maryland v. Soper* (No. 1) at 33-34; cf. *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981). But this cannot be right. If there were such a requirement, the only federal employees entitled to removal would be those who had committed a crime under state law and had a federal justification or immunity as an affirmative defense. The federal employee charged with a crime for an act done in the course of his employment and entirely innocent of any unlawful act whatsoever has no "federal defense." His defense is, "I did not do the unlawful act complained of." The removal statute reflects no intention on the part of Congress to deny such an entirely innocent federal employee the benefit of a federal forum.

Kathryn Mesa is similarly entitled to the removal of her case to the federal forum. The state of California has charged her with vehicular manslaughter in an automobile accident. In her petition for removal she has declared that "the state charges arose from an accident involving defendant which occurred while defendant was on duty and acting in the course and scope of her employment with the Postal Service." She has stated—rather skimpily to be sure—the essential facts necessary to support removal.

No doubt it would have been better practice to put in her petition what the United States Attorney did put in his brief to the trial court; that on August 16, 1985, at 3:20 p.m., Mesa, a postal employee, was driving her postal jeep to reach her assigned mail route when she moved to make a U-turn from the far left lane; that her entry into that lane was blocked by a truck; and that failing to enter that lane, she collided with a bicyclist who had "drifted over" into the middle lane; they collided, and the boy was killed. Such a narrative would have better complied with the requirements of 28 U.S.C. § 1446(a) that a removal petitioner make "a short and plain statement of the facts which entitle him to removal." See *Willingham* at 407, n.3. But Mesa should not be prejudiced because the United States Attorney representing her put in the brief what he should have put in the petition. The essential issue is clear. Mesa killed someone as, on duty, she drove a mail jeep. She was a federal employees. She was within the scope of her federal employment. She is entitled to have a federal court decide whether she killed unlawfully.

She asserts no federal defense in the sense of asserting that a mail truck driver has a license to kill bicyclists. In this respect she is like the warden and doctor in *Willingham*. Her substantive defense is assertion of innocence of the acts alleged. Her federal "defense" in the sense of *Willingham* is that she was driving her vehicle on duty. She was within the scope of her federal employment – unquestionably, as the facts stated in her petition are not denied. Her guilt of the crime charged, of which she pleads innocent, must be established, on her demand, in a federal court.

The opinion of the court create a split within the circuits. *Pennsylvania v. Newcomer*, 618 F.2d 246 (3rd Cir. 1980). For that reason alone, on a matter of this kind, we might well hesitate to reach the result the court reaches. The result is far from being required by any binding precedent. The court reads *Soper* in a broad and binding way and *Willingham* in a narrow and literal way: that is at nub of the decision of the court as far as precedents go. The opinion also invokes *Morgan v. California*, 743 F.2d 728, 731 (9th Cir. 1984). But that case dealt with the immunity of federal officers, not removal jurisdiction. The opinion in citing this case is consistent with its theory that only a defense based on federal immunity or justification will warrant removal. Finally, the opinion brings forward a policy consideration, that federal district courts should not be made traffic courts. The concern is needless. The

broad removal statute for federal employees has been on the books about 30 years without such a catastrophe. Many federal employee defendants must prefer the informality of a municipal proceeding to federal formality. The United States District Attorney, who defends such suits, and the Postal Service, which is indirectly involved in them, are able to exercise a restraining influence on defendants who foolishly desire removal. To halt a small but useful flow of federal business by a constriction of a statutory channel is unnecessary judicial housekeeping and contrary to the congressional command.

I would affirm.

For the same reasons I dissent in the case now consolidated with this one, *California v. Ebrahim*, No. 85-1500.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CR 85-2135 RPA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

SHABBIR A. EBRAHIM, A/K/A SHABBIR AZAM, DEFENDANT

[Filed Nov. 15, 1985]

ORDER AFFIRMING MAGISTRATE'S RULING

As a federal employee who was on duty and acting within the scope of his duties at the time of his alleged violation of the California Vehicle Code, Defendant Shabbir A. Ebrahim is entitled to have his case heard in federal court pursuant to 28 U.S.C. §§ 1442 *et seq.* The ruling of the Magistrate is affirmed.

IT IS SO ORDERED.

DATED: November 15, 1985

/s/ ROBERT P. AGUILAR
Robert P. Aguilar
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 85-2149 RPA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

KATHRYN ISABELLA MESA, DEFENDANT

[Filed Oct. 25, 1985]

ORDER

Good cause appearing:

IT IS ORDERED that defendant's Petition for Removal of State of California Criminal Case is hereby granted;

IT IS FURTHER ORDERED that plaintiff's Motion for Remand is hereby denied.

DATED: Oct. 25, 1985

/s/ ROBERT P. AGUILAR
Robert P. Aguilar
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1525
D.C. No. CR 85-2149-RPA

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF-APPELLANT

v.

KATHRYN ISABELLA MESA, DEFENDANT-APPELLEE

No. 86-1500
D.C. No. CR 85-2135-RPA

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF-APPELLANT

v.

SHABBIR A. EBRAHIM, a/k/a SHABBIR AZAM,
DEFENDANT-APPELLEE

[Filed Oct. 21, 1987]

ORDER

Before: MERRILL, NELSON, and NOONAN, Circuit Judge

Judge Merrill and Nelson have voted to deny the petition for a rehearing. Judge Noonan has voted to grant the petition for a rehearing. Judge Nelson has voted to reject the suggestion for a rehearing en banc, and Judge Merrill recommends rejection of the suggestion for a rehearing en banc. Judge Noonan has voted to accept the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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Supreme Court, U.S.
FILED
APR 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 871206

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

LEO HIMMELSBACH
District Attorney

KENNETH ROSENBLATT
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QUESTION PRESENTED

Whether 28 U.S.C. 1442(a)(1) allows a federal employee charged with committing a misdemeanor traffic offense while on duty to remove the ensuing prosecution to federal court where the alleged violation is unrelated to any rights, duties, privileges, immunities, or defenses provided under federal law?

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Act of May 11, 1866, 14 Stat. 46 8

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ch. 184, 14 Stat. 98, 171 8-9

Act of August 23, 1916, ch. 399,
39 Stat. 532 9

Miscellaneous:

Annals of Congress, 13th Cong.,
3d Sess., at 757 6

9 Congressional Debates, Part II,
22nd Cong., 2d Sess., 260 7

American State Papers, 1802-1815, Finance 6

Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*,
113 U.Pa.L.Rev. 739 (1965) 15

STATEMENT

Petitioners Kathryn Mesa and Shabbir Ebrahim were charged with misdemeanor traffic offenses in unrelated cases arising out of their driving while on duty as federal employees. Each filed petitions for removal based solely upon their having been on duty when the incidents occurred. Neither petitioner alleged that their acts were justified by, or depended upon, federal law. There has been no suggestion that these prosecutions were motivated by animus toward federal officials or federal law.

These are typical traffic cases. The only distinguishing feature is that the allegedly negligent drivers are federal employees.

The United States District Court for the Northern District of California simultaneously granted the petitions and denied the State of California's motions for remand. The State of California (hereinafter referred to as "California") sought review by the Ninth Circuit Court of Appeals by direct appeal and mandamus.

The Ninth Circuit held that mandamus was available to challenge the District Court's decision, and petitioners do not seek review of that ruling. The Ninth Circuit found that removal was prohibited by this Court's decision in *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33-35 (1926) (hereinafter referred to as "*Soper (No. 1)*"), requiring that the employee have alleged in his petition a defense to the charges relying upon federal law. *People of the State of*

California v. Mesa, 813 F.2d 960, 965 (9th Cir. 1987). The Circuit found *Soper (No. 1)* controlling, and thus did not rely upon other authority.

The Circuit also found petitioner's reliance upon a more recent decision to have been misplaced. *See Willingham v. Morgan*, 395 U.S. 402 (1969). The Circuit noted that the defendants in that civil case had also raised a federal defense (i.e. sovereign immunity). *Mesa*, at 966.

Although some of the language in *Willingham*, if applied literally, could support removal in all traffic cases, the court declined to supplant *Soper (No. 1)* by taking that language from a civil case and "casually" applying it to this criminal case. *Id.*, at 966.

Petitioners claim that the Ninth Circuit has misinterpreted section 1442(a)(1), and seek review by this Court. *See* Petition For A Writ of Certiorari (hereinafter referred to as "Petition").

THE PETITION SHOULD BE DENIED

Although there is a split between the Ninth and Third Circuits,[1] not all such disagreements merit the

[1] Petitioners have incorrectly asserted that several Circuits have disagreed with the decision below. The only decision directly in conflict is *Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d 246 (3d Cir. 1980). The Sixth Circuit followed *Newcomer* in finding that a federal defense is unnecessary in a *civil* case. *See Stein-Sapir v. Birdsell*, 673 F.2d 165 (6th Cir. 1982). That finding was *dicta* because the federal official had alleged a federal defense (sovereign immunity).

The Tenth Circuit decision in *City of Aurora v. Erwin*, 706 F.2d 295 (10th Cir. 1983) is irrelevant because the prosecution in that case did not contest the removal. Nonetheless, petitioners infer from the facts of that case that there was no federal defense available to support removal.

There are three problems with petitioner's interpretation. First, it appears that the dog and its owner were interfering with mail delivery (unlike the bicyclist and police vehicle in our cases). *Id.*, at 295 n.1. The mail carrier could rely upon his federal authority and duty to deliver the mail free of interference as a federal defense to the State charges.

Second, the Tenth Circuit recited the record as it appeared after conviction in federal court. Defendant's removal petition surely presented a stronger showing justifying removal than did the court's summary. We cannot speculate whether defendant's petition would have presented a sufficient showing had removal been contested.

Finally, if petitioners wish to rely upon *Aurora*, they must explain that court's statement that section 1442(a)(1) "is intended to provide a forum free from local interests and prejudice in which the federal officer *can assert immunity defenses based on official conduct.*" Id., at 296 (emphasis added) (quoting *Arizona v. Manypenny*, 451 U.S. 232 (1981); *Manypenny* is discussed *infra*).

attention of this Court. The more recent ruling from the Ninth Circuit allows removal where it matters: federal officials alleging federal defenses are still absolutely entitled to removal. State sovereignty remains intact, and yields only to cases invoking the Supremacy Clause.

This is not one of those cases. At stake here is the Solicitor General's claim that Congress intended to create a national federal court for federal employees. The Ninth Circuit's ruling rejecting that argument does not create an emergency demanding

immediate review by this Court. This Court should defer consideration of this issue until other Circuits have addressed our problem in light of the Ninth Circuit's analysis.

Furthermore, the Ninth Circuit's ruling merely restored the *status quo* established by this Court's decisions since 1867. The legislative history of section 1442(a)(1) and the relevant Supreme Court decisions establishes that Congress and this Court have always recognized that the removal statute required a federal defense.

The federal defense requirement is also supported by common sense. The prospect of hundreds or thousands of employees removing simple traffic or parking tickets to federal court is absurd. Removal in the absence of a federal defense will burden the federal judiciary unnecessarily while invading State sovereignty.

Petitioners present three arguments in favor of removal in the absence of a federal defense. First, that the "plain terms" of section 1442(a)(1) mandate removal in the absence of a federal defense. *See* Petition, at 5. Second, that the "causal connection" language employed in *Willingham* controls this case because there is no logical distinction between civil and criminal cases. Petition, at 6-7. Finally, petitioners assert that the Ninth Circuit's ruling must be incorrect because it will allow State harassment of federal officials. Petition, at 9-10. A brief

discussion of each argument reveals its shortcomings.[2]

There Are No "Plain Terms" Of Section 1442(a)(1)

The statute allows removal for acts "under color of office". Congress never defined that inherently ambiguous phrase. Had Congress wished to allow removal for acts committed in while in performance of federal duties, it would have said so. Indeed, as discussed below, Congress used that language in allowing removal for court officers. *See* 28 U.S.C. 1442(a)(3). Since the statute is ambiguous, the legislative history of section 1442(a) is dispositive in determining Congressional intent.

The History of Section 1442(a) Supports The Federal Defense Requirement

The early removal statutes were enacted as reactions to State defiance of federal law. The first removal statute, the Act of February 4, 1815, 3 Stat. 198 ("1815 Act"), was proposed to protect federal customs agents in their enforcement of federal law. The only available legislative history for that Act consists of a letter from its proponent, the Secretary

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[2] California presents a brief synopsis of its position on the merits to persuade this Court that the Ninth Circuit's decision is clearly correct. California will present these and other arguments in a more complete form should this Court decide to hear this case.

of the Treasury. *See* Annals of Congress, 13th Cong., 3d Sess., at 757-61 (also appearing in the American State Papers, 1802-1815, Finance, at 881). The Secretary related that the State of Vermont was frustrating the enforcement of federal law by insisting upon a niggardly construction of federal customs laws. Vermont courts routinely granted civil judgments against customs officials for seizures mandated by federal law. Under the Judiciary Act of September 24, 1789, decisions in civil cases could only be removed to federal courts after the judgment was affirmed by the highest court in the State. That delay would have allowed the State to forestall review until after the War ended.

The Secretary wanted to allow removal of civil cases before adjudication by any State court. *Id.*, at 760. But he clearly intended his remedy to encompass only those cases where the customs official relied upon federal law.

"A more effectual provision should be made for transferring, from the State courts to the Federal courts, suits brought against *persons exercising an authority under the United States,* so that such suits may be transferred, as soon as conveniently may be, after they are commenced."

Id., at 761 (emphasis added). Congress passed the 1815 Act, which allowed certain officials to remove civil and criminal cases where the charged acts were "agreeable to the provisions of this act, or under colour thereof..." 1815 Act, sec. 8.

There is no evidence that Congress intended to expand the previously limited powers of removal under the Judiciary Act to encompass every miscellaneous tort or petty offense committed by a customs official while on duty. Congress would not have attempted to expand the federal jurisdiction to include cases presenting no federal issues when the appellate jurisdiction of this Court to hear federal question cases removed from State courts was in dispute. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816).

The 1815 Act was a temporary measure and expired after the War of 1812. It was revived during the next State-Federal conflict, when South Carolina purported to nullify the federal tariff by passing the Nullification Act in 1832. *See* Act of March 2, 1833, 4 Stat. 632, sec. 3 ("1833 Act"). The Senate debate indicates that Congress did not intend to expand federal jurisdiction. *See* 9 Congressional Debates, Part II, 22nd Cong., 2d Sess., 260, (Remarks of Senator Wilkins), 419 (Senator Dallas), 590 (Senator Webster). The 1833 Act tracked the language of the 1815 Act.

The next federal official removal statute was enacted during the Civil War. The Act of March 3, 1863, sec. 5, 12 Stat. 756, provided for removal where the official acted "by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress." *Id.* There is no room for quibbling; this statute "by its plain terms" required a federal defense.

This Court formally confirmed the federal defense requirement in *The Mayor v. Cooper*, 73 U.S. 247 (1867). The Court upheld the constitutionality of the removal statute based upon the power of federal courts to hear federal questions. *Id.*, at 252-53.[3]

The next removal statutes were part of internal revenue laws.[4] The Act of July 13, 1866 was the first removal statute to allow removal for acts "under color of office". Congress did not discuss the new language, and this Court's view of the federal defense requirement did not change. "That the act of Congress does provide for the removal of criminal offenses against the State laws, *when there arises in them the claim of the Federal right or authority, is too plain to admit of denial.*" *Tennessee v. Davis*, 100 U.S. 257, 261, 271, 272

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[3] *The Mayor v. Cooper* considered the 1863 Act as amended by the Act of May 11, 1866, 14 Stat. 46. The changes to the Act were not significant for our issue.

[4] The 1833 Act applied only to collection of duties on imports. The Internal Revenue Act of June 30, 1864, ch. 173, section 50, 13 Stat. 241 ("1864 Act"), provided that the 1833 Act was to be "taken and deemed as extended to and embracing all cases arising under the laws for the collection of [revenue]." That provision was repealed and replaced in 1866 with a different removal statute. *See* Act of July 13, 1866, ch. 184, section 67, 14 Stat. 98, 171 ("1866 Act"), *Gay v. Ruff*, 292 U.S. 25 n.8 (1934). That Act was codified in 1874 as section 643 of the Revised Statutes, and recodified as Section 33 of the Judicial Code of 1911, 36 Stat. 1097.

(1880) (emphasis added).[5] Petitioners' error concerning "the plain terms" of section 1442(a) is demonstrated most convincingly by section 1442(a)(3), allowing court officers to remove civil and criminal actions "for or on account of any act done under color of his office *or in the performance of his duties as such officer*." Act of August 23, 1916, ch. 399, section 33, 39 Stat. 532 (emphasis added). The apparent distinction created by 1442(a)(3) between acts "under color of office" and "in performance of duties" indicates that merely being on the job is insufficient for all officials except court officers.[6]

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[5] The Court upheld the constitutionality under Article III of the 1874 codification of the 1866 Act based upon the assumption that a federal defense was required for removal. Petitioners are incorrect in stating that self-defense arising out of enforcement of federal law is "a state defense". *Compare* Petition, at 7 with *Davis* , at 261, and *Maryland v. Soper (No. 2)*, 270 U.S. 36, 42 (1926) ("such acts of defense are really part of the exercise of his official authority. They are necessary to make the enforcement effective.").

[6] Moreover, this Court has interpreted section 1442(a)(3) restrictively to allow removal only when federal authority is at stake; court officers may remove only those cases arising out of their execution of court orders. *See Gay v. Ruff*, 292 U.S. 25 (1934) (denying removal to a federally appointed receiver sued for negligence). This Court held that Congress did not intend to expand federal jurisdiction in adding section 1442(a)(3). *Id.*, at 37-38. The Court also denied removal under 1442(a)(1) because the official did not allege a federal defense to the suit. *Id.*, at 39, *see also Colorado v. Symes*, 286 U.S. 510, 518 (1932) (denying removal because officials "are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law").

Although Congress amended section 1442(a)(1) in 1948 to include "[a]ny officer of the United States or any agency thereof", the present statute still only allows removal for acts "under color of such office". The Reviser's Note states only that the right of removal was extended to all federal employees; there is no evidence that Congress altered the parameters of that protection. Sections revised in that 1948 Revision of the Judicial Code "will be presumed to bear the same meaning as did the original sections, unless an intent to change the meaning is clearly and indubitably manifested." *Peerless Casualty Co. v. United States*, 344 F.2d 495, 496 (D.C. Cir. 1964).

Thus, the legislative history of section 1442(a) and the decisions of this Court over the last 100 years clearly refute petitioners' claims.

Willingham v. Morgan Supports The Federal Defense Requirement

Petitioners first argue that this Court's "causal connection" test defines the standard for removal in civil cases. They then suggest that this test must apply to criminal cases because section 1442(a)(1) on its face does not distinguish between civil and criminal cases. Applying that standard in criminal cases would eliminate the federal defense requirement.

Petitioners' first premise is flawed. The "causal connection" test in *Willingham* does not go

to whether a federal defense is required in civil and criminal cases. Every Supreme Court case since *The Mayor v. Cooper*, *supra*, has reaffirmed that requirement. The "causal connection" test defines what facts must be alleged to put the federal defense into issue.

That is the import of *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), where this Court had to decide whether a federal official could deny having committed the charged act and still obtain removal. The federal prohibition officers had found a slain man while on duty, and were charged with murder. They denied knowledge of the killing, but requested removal because they were on duty when they found the body.

Soper (No. 1) assumed the federal defense requirement. Thus, the Court rejected the officials' affidavits on the grounds that "[t]hese averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties." *Id.*, at 35, *see Mesa*, at 965.[7]

The Court's concern was over how a federal official ignorant of the facts surrounding the incident could deny the charges and still allege a federal defense. The Court fashioned a very strict test because of the "exceptional" nature of the

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[7] Thus, petitioners' reliance upon *Soper (No. 1)* is misplaced. *See also* Petition, at 9 (quoting *Soper (No. 1)* that the removal statute was designed to prevent interference with federal officials *enforcing* federal law).

removal remedy.[8] The official had to demonstrate the "causal connection" by: 1) detailing all of his actions and showing that each act was in enforcement of, or in compliance with, federal law; and 2) negating the possibility that he was prosecuted for an act unprotected by federal law. *Id.*, at 33-34.

By doing so, the official declared that the only basis of the prosecution was either: 1) an act protected by a federal defense; or 2) his mere presence as a federal official at the scene while enforcing federal law. *Id.*, at 33. A prosecution motivated only by the official's presence enforcing federal law would violate the Supremacy Clause and present a federal defense.

Petitioners' confusion over the "causal connection" test results from the emergence of the sovereign immunity defense after *Soper (No. 1)*. That defense only requires that the federal employee have acted with discretion within the scope of his employment. *See Westfall v. Erwin*, 484 U.S. __ (1988), *Barr v. Matteo*, 360 U.S. 564 (1959).

The federal officials in *Willingham* alleged the sovereign immunity defense. Id., at 404, 409. This Court quoted *Tennessee v. Davis, supra*, in

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[8] *Id.*, at 35. The Court required officials to waive their Fifth Amendment rights and be "candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer." *Id.*, at 34, 35. Such a waiver would not be necessary if an official could obtain removal solely by stating he was on duty because such a statement could not be inculpatory.

support of the federal defense requirement, noting that the purpose of the removal statute was to prevent State prosecutions of federal officials "for an alleged offence against the law of the State, *yet warranted by the Federal authority they possess.*" *Willingham*, at 406 (emphasis added). The sovereign immunity defense can be included within this category because it immunizes federal officials for discretionary acts within their authority. Petitioners fail to allege a federal defense in our case.

Willingham also addressed the more difficult question of how to put the sovereign immunity defense in issue. This Court noted that it had held in *Soper (No. 1)* that the officials could deny having committed the charged acts. However, the strict "causal connection" test defined in that case posed a dilemma in a civil case, where the federal prison officials would be forced to describe all contacts with petitioners. *Id.*, at 407-09.

The solution was simple for civil cases. A showing that an official acted within the scope of his employment establishes the sovereign immunity defense. An allegation that the official was on duty therefore puts the defense in issue. Thus, the allegation in *Willingham* that the officials were on duty at the place of their employment at all relevant times established the "causal connection" and was sufficient to allege the sovereign immunity defense. Id., at 409.

Footnote 4 of *Willingham* merely cautioned that this easy formula might not apply to criminal cases, where sovereign immunity is not a defense.

The only analogous defense to a criminal charge is the federal immunity defense. But that defense requires the official to do more than establish that he was on duty at the time of the incident. He must show that his actions were necessary and proper to carry out his federal authority. *See Morgan v. People of the State of California*, 743 F.2d 723, 733 (9th Cir. 1984). Petitioners do not raise a federal defense.

This Court recently reiterated the federal defense requirement in *dicta*. "Federal involvement is necessary in order to insure a federal forum, *but it is limited to assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law.*" *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) (allowing a State to appeal a judgment of acquittal rendered by a federal court in a case removed under section 1442(a)(1)) (emphasis added).

Petitioners miss the point by arguing (incorrectly) that *Manypenny can* be read as supporting their views. *See* Petition, at 6 n.2. The legislative history indicates Congress intended to require a federal defense; strained constructions of Supreme Court cases are an inadequate response.

In sum, petitioners are correct that there is no distinction between civil and criminal cases regarding the issue at bar: the federal defense requirement exists in all cases. The Third Circuit in *Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d 246 (3d Cir. 1980), reached the wrong result

because it misinterpreted *Willingham*.[9] That error has already been rectified by the Ninth Circuit's decision below and does not require this Court's attention.

The Ninth Circuit has clearly interpreted *Willingham* (along with *Soper (No. 1)*), as having maintained the federal defense requirement. *Mesa, supra*, at 965, 966. That it may have also relied incorrectly upon Footnote 4 of *Willingham* in *dicta* as additional refutation of petitioners' reading of that case may be regrettable, but is hardly reason for this Court to expend its scarce resources by granting a hearing. The Ninth Circuit has restored the *status quo;* this Court should wait to see if other Circuits

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[9] The Third Circuit also stated that the removal statutes "were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of federal government by the state." *Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d 246, 250. As discussed above, the court was clearly incorrect. The court's only authority was a law review article. See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U.Pa.L.Rev. 739 (1965).

This excellent article touches on our statute in its discussion of the civil rights removal statute (28 U.S.C. 1443). Professor Amsterdam did not support the Third Circuit's interpretation of Congressional intent, although he noted that Congress intended to protect both federal law and federal officials. *See* Amsterdam, at 807, 808, n.70. The Third Circuit failed to explain Professor Amsterdam's remark that a defendant seeking removal under section 1442(a)(1) must show colorable protection under federal law. *Id.*, at 874 n.328 (citing *Tennessee v. Davis, supra*).

fail to adhere to the federal defense requirement before entering this area.

The Decision Below Will Not Allow State Harassment of Federal Officials

Petitioners suggest that the decision below will allow States to harass federal officials. Petition, at 10 n.4. First, as noted by the Ninth Circuit, there is no claim of harassment in this case; this Court can always review such a case when and if it arises. Second, the Ninth Circuit specifically stated that it might allow removal if harassment were alleged. *Mesa*, at 967.

Third, the "causal connection" test in *Soper (No. 1)* provides an adequate means of obtaining removal where the official is harassed while on duty. The official need only show that his actions were in enforcement of, or compliance with, federal law and negate the possibility that he was prosecuted for an act unprotected by federal law. *Id.*, at 33-34. The Court has already ruled that this test applies where harassment is alleged. *Compare Soper (No. 1)* with *Maryland v. Soper (No. 2)*, 270 U.S. 36 (1926).

Finally, removal is only one of the mechanisms protecting federal officials from harassment. The writ of *habeas corpus* is a potent and more useful weapon against harassment. *See* 28 U.S.C. 2241(c)(2) and (c)(3), *In Re Neagle*, 135 U.S. 1 (1890). The federal official does not have to wait until trial to win his freedom because abstention does

not apply. *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906). The procedure is economical because only the harassment claim is removed for adjudication.

Removal is useful to prevent State adjudication of federal defenses; *habeas corpus* is available to prevent harassment of federal officials generally. It is enough for our purposes that the Ninth Circuit's decision protects all federal officials who allege a federal defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LEO HIMMELSBACH
District Attorney for the
County of Santa Clara,
State of California

KENNETH ROSENBLATT
Deputy District Attorney

April 1988

No. 87-1206

Supreme Court, U.S.
FILED
JUL 18 1988
ROBERT F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JANUARY 19, 1988
CERTIORARI GRANTED: May 23, 1988

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RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

CR 85-2149

DATE	PROCEEDING
10/04/85	Petition for removal filed
10/10/85	Motion for remand filed
10/25/85	Order of District Court granting petition for removal and denying motion for remand
11/4/85	Notice of appeal filed

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1525

DATE	PROCEEDING
1/13/87	Case argued and submitted
3/26/87	Opinion filed granting writ of mandamus

MUNICIPAL COURT OF CALIFORNIA
SANTA CLARA COUNTY JUDICIAL DISTRICT
SAN JOSE FACILITY

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

KATHRYN ISABELLE MESA (3-8-59)
1725 Leeward Dr., San Jose, CA
DEFENDANT(S)

COMPLAINT

I, the undersigned, hereby certify, or, on information and belief declare:

COUNT ONE

That in the County of Santa Clara, State of California, on or about AUGUST 16, 1985, a MISDEMEANOR, to wit: a violation of CALIFORNIA PENAL CODE SECTION 192(c)(2) was committed by the above-named defendant(s), as follows, to wit: The said defendant(s) did unlawfully kill ULYSSES GALVAN, a human being, by driving a vehicle in the commission of an unlawful act and lawful act which might produce death in an unlawful manner.

COUNT TWO

That in the County of Santa Clara, State of California, on or about AUGUST 16, 1985, an INFRACTION, to wit: a violation of CALIFORNIA VEHICLE CODE SECTION 21658(a) was committed by the above-named defendant(s), as follows, to wit: The said defendant(s) did drive a vehicle, to wit: a car, on White Rd., a highway divided into two or more clearly marked lanes for traffic in one direction and did fail to drive said vehicle as nearly as practical entirely within a single lane, and did move from said lane when such movement could not be made with reasonable safety.

Complainant therefore prays that the said defendant may be dealt with according to law.

I certify under penalty of perjury that the foregoing is true and correct. Executed on SEPTEMBER 4, 1985, in Santa Clara County, California.

B.T. SMITH # 1745/L. CUTLER #1233 "T"
(Bariteau #1316)
SJPD 277-4651 #85-228-8062
MGK/D119/upc

Warrant received for service by:

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on _____

Cash or Bond $_____

JUDGE OF THE MUNICIPAL COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CRIMINAL NO. CR 85-2149

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

KATHRYN ISABELLE MESA, DEFENDANT

[FILED OCT. 4, 1985]

PETITION FOR REMOVAL OF CRIMINAL ACTION

Upon direction by the Attorney General of the United States and pursuant to 28 U.S.C. §§ 1442, *et seq.*, the undersigned attorneys hereby present the following facts to the Judges of the United States District Court for the Northern District of California on behalf of federal defendant Kathryn Isabelle Mesa, a former employee of the United States Postal Service.

1. A criminal complaint was commenced on September 4, 1985, in the Municipal Court of the State of California, County of Santa Clara, San Jose Branch, bearing the above-caption and numbered 85-228-8062, charging defendant Kathryn Isabelle Mesa with violating California Penal Code, Section 192(c)(2)—vehicular manslaughter (misdemeanor) and California Vehicle Code, Section 21658(a)—driving outside laned roadway.

2. A copy of the complaint was received by defendant and is attached hereto as Exhibit "A". Defendant was arraigned on said complaint on October 2, 1985 in the Municipal Court for the State of California, County of

Santa Clara. A pretrial conference was set for November 4, 1985. No trial date has been set in the action.

3. This action is one which may properly be removed to this Court pursuant to 28 U.S.C. §§ 1442, *et seq.*, for the reason that the complaint is directed against a former federal employee, i.e., an employee of the United States Postal Service, and the state charges arose from an accident involving defendant which occurred while defendant was on duty and acting in the course and scope of her employment with the Postal Service. In particular, 28 U.S.C. § 1442(a)(1) and § 1446(c) provide for removal of such actions.

4. The action is one which may be removed to this Court without bond pursuant to 28 U.S.C. §§ 1446(d).

WHEREFORE, the undersigned petitions this Court on behalf of the former federal employee Kathryn Mesa, that the action described in paragraph 1, above, be removed in its entirety to this Court for all further proceedings.

DATED: October 4, 1985

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

ROBERT D. WARD
Chief, Criminal Division

By: /s/ JOHN A. MENDEZ
JOHN A. MENDEZ
Assistant United States Attorney

Attorneys for Federal Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CRIMINAL NO. CR 85-2149 RPA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

KATHRYN ISABELLE MESA, DEFENDANT

[FILED OCT. 25, 1985]

ORDER

Good cause appearing:

IT IS ORDERED that defendant's Petition for Removal of State of California Criminal Case is hereby granted;

IT IS FURTHER ORDERED that plaintiff's Motion for Remand is hereby denied.

DATED: OCT. 25, 1985

/s/ ROBERT P. AGUILAR
ROBERT P. AGUILAR
United States District Court Judge

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

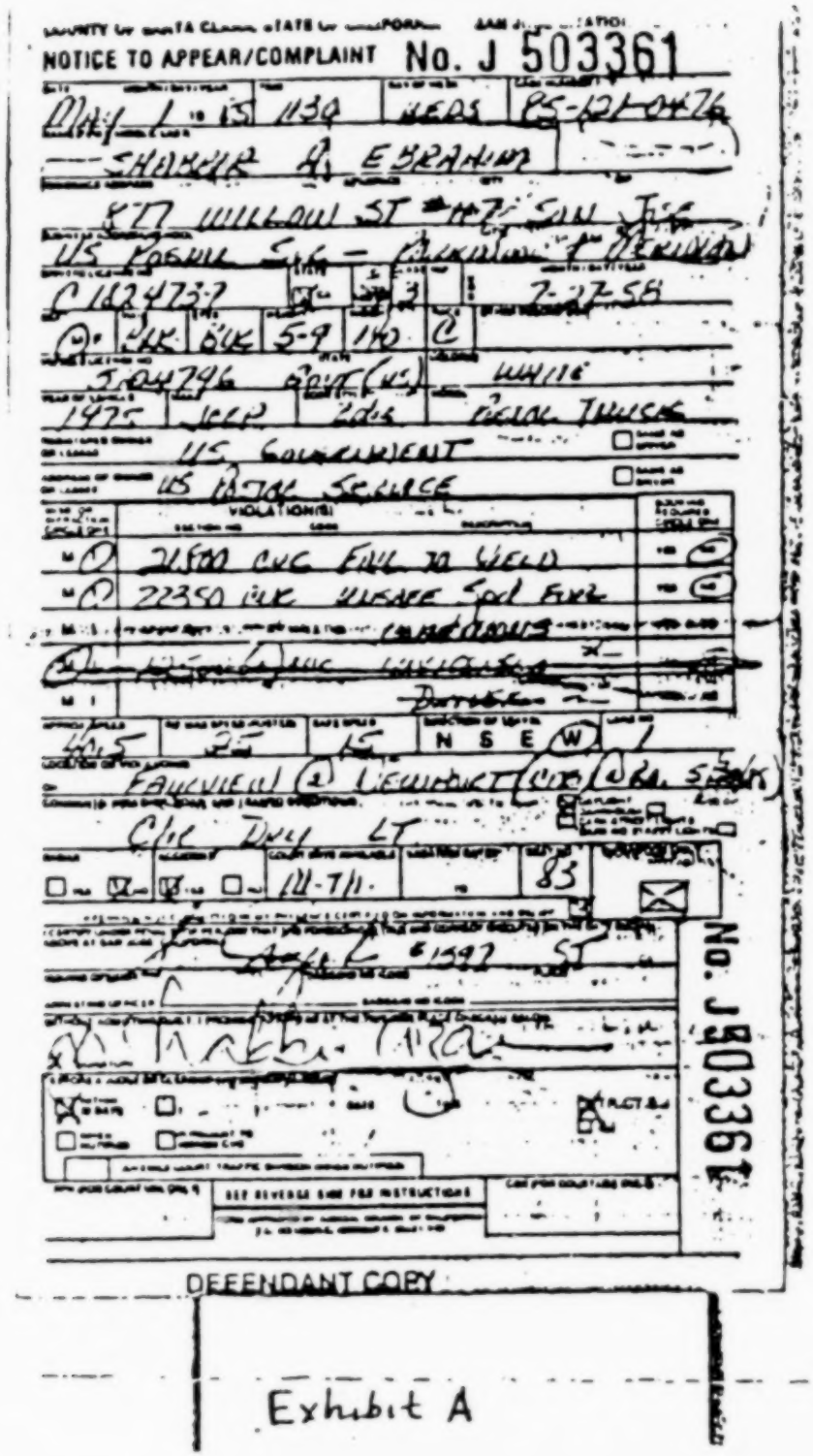
CR 85-2135

DATE	PROCEEDING
9/24/85	Petition for removal filed
10/10/85	Motion for remand filed
10/25/85	Order of magistrate granting petition for removal and denying motion for remand
11/15/85	Order of Disrtrict Court affirming ruling of magistrate
11/22/85	Notice of appeal filed

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1500

DATE	PROCEEDING
1/13/87	Case argued and submitted
3/26/87	Opinion filed granting writ of mandamus


NOTICE TO APPEAR/COMPLAINT No. J 503361

SHABBIR A EBRAHIM

877 WILLOW ST #17 SAN JOSE

US POSTAL SVC - LETTER CARRIER

C1624737 M 3 2-27-58

BLK BLK 5-9 140

5-04796 PRINT (X) WHITE

1975 JEEP 2dr POSTAL TRUCK

US GOVERNMENT

US POSTAL SERVICE

VIOLATION(S)	
21800 CVC FAIL TO YIELD	
22350 CVC UNSAFE SPD FINE	

CONDITIONS

DISPOSITION

N S E W

FAIRVIEW & LEIGHBURST (CIR) & Rd. STOP

Clr Duty LT

111-711 83

1592 ST

SEE REVERSE SIDE FOR INSTRUCTIONS

No. J503361

DEFENDANT COPY

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CRIMINAL NO. CR 85-2135 RPA

STATE OF CALIFORNIA, PLAINTIFF

v.

SHABBIR A. EBRAHIM, A/K/A SHABBIR AZAM, DEFENDANT

[FILED SEP. 24, 1985]

PETITION FOR REMOVAL OF CRIMINAL ACTION

Upon direction by the Attorney General of the United States and pursuant to 28 U.S.C. §§ 1442, *et seq.*, the undersigned attorneys hereby present the following facts to the Judges of the United States District Court for the Northern District of California on behalf of federal defendant Shabbir A. Ebrahim, aka Shabbir Azam, an employee of the United States Postal Service.

1. A complaint/traffic citation, No. J-50331, was issued on May 30, 1985, in the Municipal/Traffic Court of the State of California, City of San Jose, County of Santa Clara, bearing the above-caption and numbered 85-121-0476 for alleged violations of California Vehicle Code Sections 21800 (failure to yield) and 22350 (speeding).

2. A copy of the complaint/traffic citation was received by defendant and is attached hereto as Exhibit "A". This citation is the only process, pleading or order which has been received. Defendant was arraigned on this citation on September 16, 1985 in the Traffic Court. Trial has been set for November 7, 1985.

3. This action is one which may properly be removed to this Court pursuant to 28 U.S.C. §§ 1442, *et seq.*, for the reason that the complaint/traffic citation is directed against a federal employee, i.e., an employee of the United States Postal Service, and the state charges arose from an accident involving defendant which occurred while defendant was on duty. In particular, 28 U.S.C. § 1442(a)(1) and § 1446(c) provide for removal of such actions.

4. The action is one which may be removed to this Court without bond pursuant to 28 U.S.C. §§ 1446(d).

WHEREFORE, the undersigned petitions this Court on behalf of the federal employee that the action described in paragraph 1, above, be removed in its entirety to this Court for all further proceedings.

DATED: September 24, 1985

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

ROBERT D. WARD
Chief, Criminal Division

By: /s/ JOHN A. MENDEZ
JOHN A. MENDEZ
Assistant United States Attorney

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. CR-85-2135-MAG
Calif Case No. 85-121-0476

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

SHABBIR A. EBRAHIM, A/K/A SHABBIR AZAM, DEFENDANT

[FILED OCT. 31, 1985]

ORDER

Good cause appearing:

IT IS ORDERED that defendant's Petition for Removal of State of California Criminal Case is hereby granted;

IT IS FURTHER ORDERED that plaintiff's Motion for Remand is hereby denied. *Com. of Pa. vs. Newcomer*, 618 F.2d 246 (3d Cir. 1980).

DATED: 10/25/85

/s/ NORDIN F. BLACKER,
NORDIN F. BLACKER,
U.S. Magistrate

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. CR 85-2135 RPA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

SHABBIR A. EBRAHIM, A/K/A SHABBIR AZAM, DEFENDANT

[FILED NOV. 15, 1985]

ORDER AFFIRMING MAGISTRATE'S RULING

As a federal employee who was on duty and acting within the scope of his duties at the time of his alleged violation of the California Vehicle Code, Defendant Shabbir A. Ebrahim is entitled to have his case heard in federal court pursuant to 28 U.S.C. §§ 1442 *et seq.* The ruling of the Magistrate is affirmed.

IT IS SO ORDERED.

DATED: November 15, 1985

/s/ ROBERT P. AGUILAR
ROBERT P. AGUILAR
United States District Judge

Supreme Court of the United States

No. 87-1206

KATHRYN ISABELLA MESA AND
SHABBIR A. EBRAHIM, A/K/A
SHABBIR AZAM, PETITIONERS

v.

CALIFORNIA

ORDER ALLOWING CERTIORARI. Filed May 23, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE 1988—202 037/60814

No. 87-1206

FILED
JUL 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether an employee of the United States government, charged in state court with a crime allegedly committed while performing official duties on behalf of the United States, is entitled to remove his trial to federal district court under 28 U.S.C. 1442(a)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1206

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 813 F.2d 960. The opinions of the district court (Pet. App. 21a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1987. A petition for rehearing was denied on October 21, 1987 (Pet. App. 23a-24a). On December 10, 1987, Justice O'Connor extended the time within which to file a petition for a writ of

certiorari to and including January 19, 1988. The petition was filed on that date and was granted on May 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT

Kathryn Mesa and Shabbir Ebrahim are employees of the United States Postal Service. In separate incidents each was involved in a collision while driving a United States Postal Service vehicle in the course of delivering the United States mail. Petitioner Mesa struck and killed a bicyclist. She was charged in California state court with vehicular homicide. Petitioner Ebrahim collided with a police car and was charged by the officer with speeding and failure to yield. Pet. App. 2a & n.2.

The United States Department of Justice is representing both petitioners. See 28 C.F.R. 50.15(a). Pursuant to 28 U.S.C. 1442(a)(1), petitioners filed

removal petitions in the United States District Court for the Northern District of California. The district court granted the petitions and denied motions by the State of California to remand the cases to state court. The State filed an interlocutory appeal in each case, challenging the denial of its remand motion. The two cases were consolidated by order of the court of appeals (Pet. App. 2a n.1). Petitioners challenged the appealability of the district court's decisions denying remand. The court of appeals held that, although the State could not bring an interlocutory appeal, the court nonetheless had jurisdiction to issue a writ of mandamus to order the cases remanded to state court (*id.* at 4a-7a).[1]

On the merits, a divided panel of the court of appeals held that the fact that petitioners were performing their duties as federal officers at the time and place of the alleged criminal conduct did not satisfy the "color of office" requirement of 28 U.S.C. 1442(a)(1). The court stated (Pet. App. 10a) that the primary purpose of the removal statute was to permit a federal official with a federal defense to litigate that defense in federal court. Petitioners have not raised any federal defense, the court noted (*id.* at 11a), and their cases therefore turn entirely on issues of state law. While acknowledging (*id.* at 13a) that a desire "to permit trial on state-law claims free from local prejudice against federal interests * * * certainly played a role in the evolution of section 1442(a)(1)," the court nonetheless concluded (Pet. App. 11a) that "[t]he attenuated federal interest in ensuring that [petitioners'] trial be

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[1] Petitioners did not seek certiorari on this aspect of the court of appeals' decision. See Pet. 3 n.1.

unbiased does not justify an invasion of the state's authority to police its streets."

The court of appeals acknowledged (Pet. App. 11a) that this Court had "read the 'color of office' provision of 28 U.S.C. § 1442(a)(1) quite broadly" in *Willingham* v. *Morgan*, 395 U.S. 402 (1969), and held there that removal was appropriate based simply on "the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times" (*id.* at 409). The court of appeals noted, however, that *Willingham* was a civil case and declined to "casually import[]" that reading of the statute "into the criminal arena" (Pet. App. 12a). Stressing "the states' compelling interest in the administration of their criminal justice systems," the court of appeals concluded (*id.* at 14a) that "federal postal workers may not remove state criminal prosecutions to federal court when they raise no colorable claim of federal immunity or other federal defense." The court therefore issued the writ of mandamus ordering the district court to remand the two prosecutions for trial in the California state courts.

Judge Noonan dissented, concluding that the "unusually spacious" language of the statute was not to be given such a restricted reading. "It is not a requirement for removal," he stated (Pet. App. 18a), "that the employee have a federal defense to the charges. * * * The federal employee charged with a crime for an act done in the course of his employment and entirely innocent of any unlawful act whatsoever has 'no federal defense.' His defense is, 'I did not do the unlawful act complained of.' The removal statute reflects no intention on the part of Congress to deny such an entirely innocent federal employee the benefit of a federal forum."

Judge Noonan noted (Pet. App. 17a) that "[i]t is no derogation of any existing state sovereignty when the national government exercises its own authority to create a federal forum in which the acts of its agents will be measured." He therefore rejected the majority's use of different standards for removal in criminal and civil cases. "In the removal statute," the dissent observed (*ibid.*), "Congress has made no differentiation between 'civil actions' and 'criminal prosecutions.' * * * A court should not distinguish where Congress in the exercise of its constitutional power has drawn no line." Judge Noonan therefore concluded (*id.* at 16a) that "under color of office" is properly read in both types of cases as "the equivalent of 'within the scope of their employment.'"

SUMMARY OF ARGUMENT

Section 1442(a)(1) permits removal of "[a] civil action or criminal prosecution" by "[a]ny officer of the United States" for "any act under color of such office." The phrase "under color of office" limits removal to suits arising out of the exercise of an employee's official duties. But there is no requirement, nor can one plausibly be read into Section 1442(a)(1), that the employee's actions be justified by federal law. The term "color," as used in Section 1442(a)(1), refers to the *appearance* of a right, authority or office, such as any federal employee enjoys when he is performing official duties, whether his actual performance of those duties is justified by federal law or not.

This reading of the phrase "under color of office" is consistent with the Court's construction of analogous language in other federal statutes. The Court has always read the words "under color of" law or

legal authority to apply whenever a public employee is acting in his official capacity, even if he abuses the authority given to him. An equally broad reading is appropriate here. An FBI agent conducting an allegedly illegal search, an engineer from the Army Corps of Engineers building an allegedly unsafe bridge, an EPA inspector conducting an allegedly negligent inspection, and a postman delivering the mail at an allegedly excessive speed are all acting "under color of" their respective offices, even if their actions are wrongful under state law and not justified by federal law.

This Court's civil cases construing Section 1442 (a)(1) and its predecessors have therefore permitted removal by federal officials without regard to the presence of any issue of federal law raised by the defendant. Removal is appropriate, the Court has stressed, whenever there is a causal connection between the charged conduct and the performance of the defendants' official duties, and that connection may consist of nothing more than the fact that the defendants were on duty, at their place of federal employment, when the incident occurred. The Court's civil cases make clear that the right to removal is as available to a federal defendant who simply denies committing the act alleged as to one who admits the act but claims an official immunity.

The Court's criminal cases construing the removal statute are more ambiguous, but on balance they are also consistent with the plain meaning of the statute. Furthermore, there is no justification in the language of the statute for applying a test in criminal cases different from that used in civil cases. Section 1442 (a)(1) states simply that "[a] civil action or criminal prosecution * * * may be removed" and then proceeds to state a single test governing all cases.

The court of appeals' requirement of a "federal defense" as a prerequisite to removal frustrates the statute's purpose—to protect federal officers from interference by hostile state courts. Federal policy can be disrupted more readily by false charges than by the relatively rare circumstance of otherwise legitimate charges that are expressly precluded by federal law. In either instance, the federal interest in ensuring a federal forum is the same. The decision below thus presents a potential threat to federal supremacy anywhere federal policies encounter local hostility.

ARGUMENT

A FEDERAL EMPLOYEE CHARGED IN STATE COURT WITH A CRIME ALLEGEDLY COMMITTED WHILE PERFORMING OFFICIAL DUTIES ON BEHALF OF THE UNITED STATES IS ENTITLED TO REMOVE HIS TRIAL TO FEDERAL DISTRICT COURT UNDER 28 U.S.C. 1442(a)(1)

The court of appeals has imposed upon the "unusually spacious" (Pet. App. 18a) language of Section 1442(a)(1) an artificial distinction between cases in which a federal official charged with a crime for actions within the scope of his employment proposes to offer a "federal defense" and those in which he does not. By allowing removal in the former instance but not the latter, the court of appeals seeks to strike a balance between the protection of federal governmental functions and the state's interest in the enforcement of its criminal laws (Pet. App. 13a-14a). The presence or absence of a "federal defense," however, is not a useful measure of this balance.

Whenever a federal official is charged with a state crime for actions within the scope of his employment, the prosecution poses a challenge to the manner in which the official has performed his duties. The challenge to that performance of his job is no less where the official responds that he did not do the act charged, or that he lacked a criminal state of mind, than where he claims that his behavior is shielded by an official privilege or immunity. In each instance, the official is called to account in a state criminal court for the manner in which he has acted in the course of carrying out his federal responsibilities. In each instance, federal government functions will be disrupted and the possibility exists that interference by the state is a deliberate attempt to frustrate federal policy.

Whether the criminal charges in any given case are justified or unjustified cannot be known until after a determination of the merits of the case. What the removal statute ensures is that that determination will be made in federal court so as "to protect federal officers from interference by hostile state courts" (*Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969)). At the same time, the removal statute ensures "the highest regard for a State's right to make and enforce its own criminal laws" (*Arizona* v. *Manypenny*, 451 U.S. 232, 243 (1981)) by requiring that all but the procedural aspects of the removed case will still be governed by state law. That is the balance struck by the removal statute.

The reading of Section 1442(a)(1) that we advocate here—which allows removal whenever a federal official is prosecuted for the manner in which he has performed his federal duties—is supported by the language and history of the statute. It is also explicitly adopted in this Court's cases dealing with the removal of civil actions against federal employees, and is consistent with a reasonable reading of this Court's decisions on the removal of state criminal prosecutions.

A. The Plain Language Of Section 1442(a)(1) Permits Removal Without Assertion Of A Federal Defense

Section 1442(a)(1) is written in "sweeping terms." P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1057 (3d ed. 1988). It permits removal of "[a] civil action or criminal prosecution" by "[a]ny officer of the United States" for "any act under color of such office." The phrase "under color of office" limits removal to suits arising out of the exercise of an employee's official duties. Thus, a federal employee who commits a crime or a tort while off-duty is not entitled to invoke Section 1442(a)(1). See, *e.g.*, *Maryland* v. *Soper (No. 2)*, 270 U.S. 36, 42 (1926) (appearance of federal official before a state coroner "is not an act of his under federal authority" and he connot remove a subsequent prosecution for obstruction of justice). But employees who are brought to trial in state court for actions taken while "on duty, at their place of federal employment" (*Willingham* v. *Morgan*, 395 U.S. at 409) are entitled to remove their cases to federal court. There is no requirement, nor can one plausibly be read into Section 1442(a)(1), that the employees' actions be justified by federal law. Section 1442(a)(1) is not limited to employees "with a defense based on federal law," and the words "under color of office" will not bear such weight.

The term "color," as used in Section 1442(a)(1), implies the *appearance* of a right, authority or office, such as any federal employee enjoys when he is per-

forming official duties, whether his actual performance of those duties is justified by federal law or not.

> It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

Screws v. *United States*, 325 U.S. 91, 111 (1945) (plurality opinion) (construing predecessor of 18 U.S.C. 242).

This construction is consistent with the Court's interpretation of analogous language in 42 U.S.C. 1983, which provides a federal cause of action against any person who deprives a citizen of his federal rights while acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." The predecessor of 42 U.S.C. 1983, Section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, was enacted, like the predecessors of Section 1442 (a)(1), to provide a federal forum for a category of cases that Congress was unwilling to trust to the state courts. See *Mitchum* v. *Foster*, 407 U.S. 225, 238-242 (1972).

The Court has consistently interpreted the "under color of state law" requirement in Section 1983 broadly. "[S]tate employment is generally sufficient to render the defendant a state actor." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 936 n.18 (1982). Indeed, "a public employee acts under color of state law while acting in his official capacity or while exercising

his responsibilities pursuant to state law" even "when he abuses the position given to him by the State." *West* v. *Atkins*, No. 87-5096 (June 20, 1988), slip op. 7. See also *Monroe* v. *Pape*, 365 U.S. 167, 184-187 (1961), overruled on other grounds, *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 695-701 (1978); *United States* v. *Classic*, 313 U.S. 299, 326 (1941) (similar construction for "under color of" state law language in predecessor of 18 U.S.C. 242).[2]

Just as the meaning of the words "under color of state law" has not been limited to acts arguably authorized by law, the words "under color of office"

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[2] In *Screws* v. *United States*, *supra*, the dissent expressly drew the parallel between the language of the removal statute and the language of the predecessor of Section 242, stating that the construction of the former "should be binding in the situation now before us" (325 U.S. at 146). The dissent, however, read the Court's cases interpreting the removal statute narrowly to "indicate[] that misuse of federal authority does not come within the statute's protection" (*id.* at 145). As discussed below, that reading is not mandated by the criminal cases upon which the dissent relied. See pages 17-25, *infra*.

The plurality in *Screws* did not take issue with the dissent's "strict" reading of the removal statute, but instead simply asserted that the statute was not "in point" because the policies behind the two statutes were different (325 U.S. at 111-112). But the parallel language of the two contemporaneous statutes cannot be so easily brushed aside. If anything, the "under color of" state law language in 42 U.S.C. 1983 and 18 U.S.C. 242 would suggest a narrower limitation to conduct grounded in specific state laws as compared with the "under color of office" language of the removal statute, which suggests that the conduct at issue need only arise out of the performance of official duties. Furthermore, the policies underlying Section 1442(a)(1) fully support a reading of the statute at least as broad as that of Sections 242 and 1983. See pages 28-31, *infra*.

have not been and should not be limited to acts arguably authorized by that office. An FBI agent conducting an allegedly illegal search, an engineer from the Army Corps of Engineers building an allegedly unsafe bridge, an EPA inspector conducting an allegedly negligent inspection, and a postman delivering the mail at an allegedly excessive speed are all acting "under color of" their respective offices. Even if their actions are wrongful under state law and not justified by federal law, these employees are still "undertak[ing] to perform their official duties," not acting "in the ambit of their personal pursuits." *Screws* v. *United States*, 325 U.S. at 111. In all such cases, the federal employees are entitled "to present their version of the facts to a federal, not a state, court." *Willingham* v. *Morgan*, 395 U.S. at 409.[3]

[3] A similar reading was intended for the "under color of" language in the judicial review provision of the Administrative Procedure Act, 5 U.S.C. 702, which provides, in pertinent part:

> An action in a court of the United States seeking relief other tha[n] money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States.

The legislative history of this provision indicates that the quoted language was intended "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seekirg relief other than money damages and based on the assertion of *unlawful* official action by a Federal officer." S. Rep. 94-996, 94th Cong., 2d Sess. 2 (1976) (emphasis added). It is clear then that action can be "under color of legal authority" whether or not it is justified by, and even where it violates, that authority. See *Webster* v. *Doe*, No. 86-1294 (June 15, 1988).

B. The Statute's History And Its Construction By This Court Are Consistent With The Plain Meaning Interpretation Of Its Language

1. *The History of Section 1442(a)(1)*

Section 1442(a)(1) has a long lineage. The first removal act for federal officials was a temporary measure enacted in 1815.[4] See Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198. Prompted by New England's resistance to embargoes imposed during the War of 1812 (see 28 Annals of Cong. 758-761 (1814)), the Act permitted those enforcing the U.S. Customs laws to remove "any suit or prosecution" against them into federal court for "any thing done or omitted to be done, as an officer of customs," or "by virtue of" the customs laws or "under colour thereof."

In 1833, Congress found it "desirable to revive [the removal provision], with some modifications better adapted to the occasion" (9 Cong. Deb. App., Pt. 2, at 153 (1833)), in response to a new national crisis—South Carolina's nullification of the federal customs laws. The "Force Bill," as it came to be known, provided removal authority for any "suit or prosecution" brought against "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States or under colour thereof." Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633. The avowed purpose of the removal provision was to prevent state interference with the collection of federal customs duties. 9 Cong. Deb. App., Pt. 2, at 153 (1833). Removal was considered necessary because federal officers could not get a fair trial from jurors who had sworn allegiance

[4] This removal provision was designed to last only during the War of 1812, though it was temporarily extended by the Act of Mar. 3, 1817, ch. 109, § 2, 3 Stat. 396.

to the South Carolina nullification act. *Id.*, Pt. 1, at 462 (remarks of Sen. Webster).

During the Civil War, Congress passed an additional, temporary provision to allow general removal by "any officer, civil or military" of "any suit or prosecution, civil or criminal" for any "wrongs done or committed * * * during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress." Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756. See *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247 (1867). This removal provision expired shortly after the Civil War, but the Force Bill of 1833 continued in effect and was gradually expanded in scope to apply to collectors of the internal revenue (Act of Mar. 7, 1864, ch. 20, § 9, 13 Stat. 17), to persons acting under color of the Elective Franchise Act (Act of Feb. 28, 1871, ch. 99, § 13, 16 Stat. 437-438 (repealed 1894)), to officers of either House of Congress (Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 401), to court officers (Act of Aug. 23, 1916, ch. 399, 39 Stat. 532), to soldiers in the military service (Act of Aug. 29, 1916, ch. 418, § 3, Art. 117, 39 Stat. 669), to prohibition officers (National Prohibition Act of 1919, ch. 83, § 28, 41 Stat. 316 (repealed 1935)), and finally to "[a]ny officer of the United States or any agency thereof, or person acting under him" (Act of June 25, 1948, ch. 648, § 1442, 62 Stat. 938). The words "under color of office" were introduced in 1866, when the removal provision in the Force Bill was amended without debate, in a bill to restructure and lower taxes, to apply to "any case, civil or criminal" brought against a revenue officer "on account of any act done under color of his office." Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171 (codified as Rev. Stat. § 643 (2d ed. 1873-1874 ed.)).

2. *This Court's Civil Cases Construing Section 1442 (a)(1) And Its Predecessors Permit Removal Without Assertion Of A Federal Defense*

The "under color of office" language was first interpreted by the Court in a civil context in *Cleveland, C. &c., R.R.* v. *McClung*, 119 U.S. 454 (1886).[5] In *McClung*, a railroad brought suit in state court against a collector of customs alleging that the collector's deputy delivered goods upon which there was a lien for freight charges to a consignee upon receipt of the money due for the freight charges without turning that money over to the railroad. The railroad sued the collector for the money so received, and the collector removed the case to federal court. The railroad contended in this Court that the case was improperly removed because the collector had claimed in his defense "that it was not the official duty of the collector to collect the carrier's money, and, therefore, that he is not liable for the acts of his deputy in that behalf" (119 U.S. at 461). The collector had claimed, in other words, not that his actions were justified by federal law but rather that he bore no responsibility for the alleged wrongdoing.

The Court found the action removable despite the absence of any federal defense. "[T]he right to a removal is not taken away because the collector says in his defense that the act charged was not in fact done. If done by him it was done under color of his office. The thing to be tried is whether it was done" (119 U.S. at 461). *McClung*, therefore, stands for the proposition that a federal defense is not a prerequisite to removal. *McClung* makes clear, to the

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[5] *Tennessee* v. *Davis*, 100 U.S. 257 (1880), discussed *infra*, pages 19-21, is the earliest criminal case dealing with this statute.

contrary, that actions committed in the course of performing one's job are committed "under color of office" regardless what defense is to be offered.

This natural reading of the phrase "under color of office" was continued by this Court after Congress in 1948—without any comment or debate (see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *supra*, at 1057) —extended the scope of the removal statute to cover all federal employees. In *Willingham* v. *Morgan*, 395 U.S. at 409, the Court stated that removal is appropriate whenever there is a "causal connection" between the charged conduct and the performance of the defendant's official duties. In a suit by a prisoner against the warden and chief medical officer of a federal penitentiary, the Court found sufficient "causal connection" in the fact that the defendants' only contact with the prisoner had been in performance of their official duties. "The connection consists, simply enough, of the undisputed fact that [the defendants] were on duty, at their place of federal employment, at all the relevant times." *Willingham*, 395 U.S. at 409.

In *Willingham*, the Court noted that the defendants had a potential defense based on official immunity (see 395 U.S. at 406, 409), and that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in federal court" (*id.* at 407). But the Court did not limit its reading of Section 1442(a)(1) to cases in which "federal officers can raise a colorable defense arising out of their duty to enforce federal law" (395 U.S. at 406-407). The Court in *Willingham* did not find it necessary even to discuss whether the claim of official immunity at issue there was colorable, concluding simply that "it was sufficient for [the defendants] to have shown that their relationship to [the

plaintiff] derived solely from their official duties" (395 U.S. at 409). Under those circumstances, the Court stated (*ibid.*), the defendants "should have an opportunity to present their version of the facts to a federal, not a state, court."

If the test applied in *Willingham* and *McClung* is applied in this case, petitioners are clearly entitled to removal. Petitioners have both pled "not guilty" to the charges against them. It is not presently clear what specific defenses they will offer. It is clear, however, that the events in question here occurred while petitioners were driving their mail trucks in the course of delivering the United States mail. As in *Willingham*, 395 U.S. at 409, petitioners were "on duty, at their place of federal employment, at all the relevant times," and, following that case's reasoning, they too "should have the opportunity to present their version of the facts to a federal, not a state, court" (*ibid.*).

3. *There Is No Justification For Applying, And This Court's Cases Do Not Mandate, A Different Test For Removal In Criminal Cases*

There is no persuasive basis, we submit, for applying a different test here on the ground that this is a criminal case. In *Willingham*, the Court did remark in passing (395 U.S. at 409 n.4) that "a more detailed showing might be necessary" in a criminal case "because of the more compelling state interest in conducting criminal trials in the state courts." As Judge Noonan noted, however, there is no justification in the language of the statute for such a distinction. Section 1442(a)(1) states simply that "[a] civil action or criminal prosecution * * * may be

removed" and then proceeds to state a single test governing all cases. The phrase "under color of office" cannot plausibly be read to mean different things for different cases, and "[a] court should not distinguish where Congress in the exercise of its constitutional power has drawn no line" (Pet. App. 17a).

The earliest removal statutes applied to "any suit or prosecution." See Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198; Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633. Although this language on its face appears to apply to both civil suits and criminal prosecutions, there was apparently some ambiguity as to whether the statute in fact extended to criminal cases. See Cong. Globe, 37th Cong., 3d Sess. 534 (1863) (remarks of Sens. Sumner and Collamer). Congress accordingly amended the language of a bill providing broad removal authority during the Civil War so "as to exclude all possibility of doubt that this language is applicable to criminal as well as to civil suits or prosecutions." *Id.* at 535 (remarks of Sen. Sumner). The proposed amendment sparked considerable controversy. Some Senators contended that the bill was unconstitutional because it would allow federal courts to decide criminal cases involving only issues of state law. *Id.* at 534 (remarks of Sen. Trumbull); *id.* at 537 (remarks of Sen. Bayard). The amendment nonetheless passed by a comfortable margin (*id.* at 538) and was defended as "a matter of necessity" to ensure fair trials for federal officials charged with state offenses. *Id.* at 535 (remarks of Sen. Clark); *ibid.* (remarks of Sen. Sumner) ("I think that we ought to adapt it both to criminal and to civil proceedings, and that unless we do, the bill will be a failure.").

The statute as amended was, thus, made expressly applicable to "any suit or prosecution, civil or criminal." Act. of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756. This same language was then added to the Force Bill when it was amended in 1866. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171. In *Tennessee* v. *Davis*, 100 U.S. 257, 265 (1880), the Court upheld the constitutionality of this predecessor to Section 1442(a)(1) and stated that the reasons for removal "are equally applicable to both" civil suits and criminal prosecutions. The Court also found "no room for reasonable doubt" that the removal statute applied to a murder prosecution brought against a revenue collector who claimed that he killed in self-defense while engaged in the discharge of his duties (100 U.S. at 261). "Such is [the statute's] positive language," the Court explained, "and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State" (*id.* at 262).

The Court in *Tennessee* v. *Davis* noted that the purpose of the removal statute is to prevent interference by state courts with the performance of federal functions (100 U.S. at 263). The Court recognized that the statute, in accordance with that purpose, authorizes removal whenever the acts of the defendant "were done, or claimed to have been done, in the discharge of his duty as a Federal officer" (*id.* at 261-262). Indeed, the Court expressly equated actions done by the defendant "under color of his office as a revenue collector"—the statutory test—with actions taken "while he was engaged in performing his duties as a revenue officer" (*id.* at 261). Although the decision also contains language suggesting that

removal may depend upon the assertion by the defendant of a "Federal right or authority" (*id.* at 262),[6] it cannot fairly be read to require, as a prerequisite to removal, a defense based on federal law. For, although the defendant in that case claimed that his actions were "done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty" (*id.* at 261), his claim of self-defense in fact turned on state rather than federal law.[7] The defendant's assertion

[6] See, *e.g.*, 100 U.S. at 262 ("when [the statute] speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws, in which defences are set up or claimed under United States laws or authority").

[7] In *Maryland* v. *Soper (No. 2)*, 270 U.S. 36, 42 (1926), the Court remarked that "acts committed by a federal officer in defense of his life, threatened while enforcing or attempting to enforce the law * * * are really part of the exercise of his official authority" because "[t]hey are necessary to make the enforcement effective." It does not follow, however, that such a defense is governed by federal law. A justified use of force in self-defense by a federal official enforcing federal law is indeed "necessary to make the enforcement effective," but the determination of whether the use of force was justified is still—except to the extent the Court is prepared to develop a federal common law of "justification" applicable to crimes committed by federal employees in the performance of their duties—a question of state rather than federal law.

Thus, in *Georgia* v. *Grady*, 10 Fed. Cas. 245 (1876), a soldier enforcing the revenue laws shot and killed the owner of an illegal still in what he claimed was self-defense. The soldier, charged with murder by the State of Georgia, removed the case to federal court under the same 1866 removal statute at issue in *Tennessee* v. *Davis*. The court in *Grady* permitted the removal, but nonetheless charged the jury that the soldier's defense was "to be determined by the law of Georgia" (10 Fed. Cas. at 247). The court went on to explain the extent to which "[t]he Code of Georgia justifies a homicide committed in defense of one's person" and stressed that "[t]he defendant had the same, and only the same, rights of self-defense that a citizen would have had under the same circumstances" (*ibid.*). The defendant was not to be afforded any special protection because he was a soldier, or because he was on duty performing his federal duties at the time of the shooting, or because the victim was engaged in a violation of federal law (*ibid.*).

of "federal authority" was only of the general authority to do his job undisrupted, and not of any federal law theory of defense. Thus, *Tennessee* v. *Davis* permits removal where no specific defense based on federal law is claimed.[8]

This reading of the removal statute was confirmed two years later by the Court's decision in *Davis* v. *South Carolina*, 107 U.S. 597 (1882). In that case a soldier enforcing the revenue laws shot and killed a distiller when the victim "made his escape through a hole in the side of the house near where [the soldier] was standing, sprang past him, frightening his horse, and accidentally discharging his piece" (107 U.S. at 598). When the soldier was indicted for murder in state court, he removed the case to federal court stating only that "[y]our petitioner shows that at the time of said accident he was in the discharge of his duty, and that said shooting * * * was purely accidental" (*ibid.*). This Court affirmed the removal,

[8] Although the Court notes that the removal petition went beyond these minimal requirements by asserting that the actions were "done under and by right of his office" (100 U.S. at 261), that remark, and others like it, seem to be addressed more to establishing the constitutionality of the removal there in issue than to stating an express requirement of the statute (see, *e.g.*, *id.* at 263).

noting simply that the removal "petition set out the necessary facts showing that the homicide which was charged against him as a crime took place while he was in discharge of his official duty" (*id.* at 600-601).

The Court's remaining decisions on the removal of state criminal actions against federal officials, while not without ambiguity, also support a construction of the statute that allows removal without the assertion of any justification based on federal law. In *Maryland* v. *Soper (No. 1)*, 270 U.S. 9 (1926), four revenue agents were charged with murder. They sought to remove the case to federal court on the grounds that the acts in question "were done in the discharge of their official duties as prohibition agents, and as officers of the internal revenue service in the discharge of their duty" (*id.* at 22). This Court rejected the removal petition at issue in that case, saying that it did not "negative the possibility that [the defendants] were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty" (*id.* at 35).

At some points in its opinion, the Court seemed to state that the removal petition would only be sufficient if it asserted a federal defense to the charges. See, *e.g.*, 270 U.S. at 34 ("The defense [the federal official] is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based."). The Court also stressed, however, that a defendant need not admit that he actually committed the charged offense in order to obtain removal.

Removal is available even to the officer who denies any relationship to the charged offense, provided only that there is "a causal connection between what the officer has done under asserted official authority and the state prosecution. * * * It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution." *Id.* at 33.

The removal petition in *Soper (No. 1)* was denied because it was "not sufficiently informing and specific to make a case for removal" (270 U.S. at 34). It failed to state in a "candid, specific and positive" manner precisely what it was that the defendants were claiming happened (*id.* at 35), and thus failed to show that "the reason and occasion for the criminal charge and the prosecution against them" arose out of their official duties and not out of "other acts than official acts at the time and on this occasion" (*ibid.*). The petition was not denied because it failed to state a federal defense to the charges.[9]

Colorado v. *Symes*, 286 U.S. 510 (1932), appears to have been decided on similar grounds. In that case

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[9] A comparison with *Maryland* v. *Soper (No. 2)*, *supra*, is instructive. In *Soper (No. 2)*, the Court held that federal officials could not remove a prosecution for conspiracy to obstruct justice arising out of their testimony before a state coroner. The defendant officials in *Soper (No. 2)* had no federal defense to the state charges, but the Court did not deny removal on that ground. Rather, the Court denied removal because the charges against the officials did not arise out of "an act of [theirs] under federal authority" (270 U.S. at 42). Similarly, the Court in *Soper (No. 1)* rejected the removal petition as insufficient—though with leave to amend it—not because it did not assert a federal defense but because the defendant officials did not "negative the possibility that they were doing other acts than official acts" (270 U.S. at 35).

a prohibition agent charged with murder in state court sought to remove the case to federal court on the ground that the victim was killed in a struggle while resisting arrest for a violation of the prohibition laws. This Court rejected the removal petition because it did not "give specific information as to the details of the occurrence" (286 U.S. at 521) so as to enable the Court to determine "that petitioner's claim [that he was entitled to removal] is not without foundation and is made in good faith" (*id.* at 519). The Court indicated that a proper removal petition must show that the defendant acted only "in the proper discharge of his duty" (*id.* at 518). But that fact could be established by a claim that the homicide was "excusable or justifiable" (*ibid.*) under the state law of self-defense, or presumably by the claim that "the act charged was not in fact done" (*McClung*, 119 U.S. at 461). The Court did not say that any peculiarly federal defense was necessary.

Most recently, in *Arizona* v. *Manypenny*, *supra*, the Court assumed the propriety of removing to federal court a state assault prosecution against a Border Patrol agent on the ground that "the charge arose from an act committed while on duty for the INS" (451 U.S. at 235). While the removal itself was not challenged before this Court, it is noteworthy that the Court's discussion in explaining the removal articulated a standard—"an act committed while on duty"—indistinguishable from that set forth in *Willingham*, and at no point suggested that a more stringent standard might be justified because a criminal case was involved.

The Court in *Manypenny* did note that the removal statute "was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties" (451 U.S. at 241). But the Court did not state that an immunity defense based on federal law was a prerequisite to removal.[10] Rather, the Court noted a broader purpose behind the removal statute, which also "permits a trial upon the merits of the state-law question free from local interests or prejudice" (*id.* at 242). "For [both] these reasons," the Court stressed, "the right of removal is absolute for conduct performed under color of federal office, and * * * the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Ibid.* (quoting *Willingham* v. *Morgan*, 395 U.S. at 407).

C. Related Removal Provisions Reinforce The Conclusion That Removal Under Section 1442(a)(1) Does Not Require A Federal Defense

1. Subsection (a)(3) of 28 U.S.C. 1442 provides for the removal of any civil action or criminal prosecution brought against court officers. This subsection derives from the Act of Aug. 23, 1916, ch. 399, 39 Stat. 532. In light of the 1948 extension of 28 U.S.C. 1442(a)(1) to "[a]ny officer of the United States," this specialized removal provision—like sub-

[10] Indeed, "an immunity defense had not been raised at trial" (451 U.S. at 236) and, thus, was not used by the defendant to justify the removal of his case under Section 1442(a)(1). Rather, as noted, removal was appropriate simply because "the charge arose from an act committed while on duty for the INS" (451 U.S. at 235). But the district court sua sponte concluded after trial "that it had erred in failing to instruct the jury on such a defense" and granted a "presumed motion for acquittal" by the defendant on that ground (*id.* at 236-237). The question at issue in that case was whether state or federal law governed the right of the state to appeal from that decision.

section (a)(4), which applies to officers of either House of Congress—is merely historical "residue" of earlier removal statutes. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *supra*, at 1057. A consideration of its precise language, however, reinforces the conclusion that removal applies to any case in which the federal official is acting "in the performance of his duties" and is not limited to cases in which the federal employee raises a federal defense.

Subsection (a)(3) permits removal of any case brought against "[a]ny officer of the courts of the United States, for any act under color of office *or in the performance of his duties*" (28 U.S.C. 1442(a)(3) (emphasis added)). In *Gay* v. *Ruff*, 292 U.S. 25 (1934), this Court noted that the predecessor of this subsection was designed to give United States marshals executing process " 'the same protection in all cases now given to officers acting under the revenue laws * * *.' " 292 U.S. at 38 (quoting H.R. Rep. 776, 64th Cong., 1st Sess. 2 (1916)). In other words, both Congress and this Court viewed the additional phrase "in the performance of his duties" as simply coterminous with the phrase "under color of office," since only the latter and not the former was to be found in the removal statute covering officers acting under the revenue laws. This additional clause did not broaden the scope of the provision at all because such actions were already covered.[11]

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[11] The Court held in *Gay* v. *Ruff* that the new provision did not authorize removal of an action against a railroad receiver appointed by a federal court to recover damages caused by the negligence of railroad employees after the appointment. But the reason for that holding was simply that the receiver was "not an officer engaged in enforcing an order of a court" (292 U.S. at 39).

2. Section 1443(2) of Title 28 permits removal of "civil actions or criminal prosecutions" brought in state court "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." In *Greenwood* v. *Peacock*, 384 U.S. 808, 823 (1966), this Court held that removal under this provision was not available to private persons because the "color of authority" language "was clearly limited to enforcement activity by federal officers and those acting under them."[12] But the Court did not suggest that any federal defense was required as a prerequisite to removal by those officers. Rather, the Court stressed (*id.* at 823 n.21) that removal applied to "the full range of enforcement activities in which federal officers might be engaged under the Civil Rights Act." That reading of the phrase "under color of" seems particularly appropriate in the area of civil rights enforcement, an area in which federal policies have frequently encountered local hostility. To require a federal defense would, as we explain below, defeat the purpose of the removal statute by permitting a state to interfere with federal enforcement activities by means of charges that, while not expressly precluded by federal law, are simply false.

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[12] The Court acknowledged (384 U.S. at 820 n.17) that, in light of the 1948 extension of Section 1442(a)(1), "many, if not all, of the cases presently removable under § 1443(2) would now also be removable under § 1442(a)(1)." The Court noted (*ibid.*), however, that "[t]he present overlap between the provisions simply reflects the separate historical evolution of the removal provision for officers in civil rights legislation."

D. The Purpose Of Section 1442(a)(1) Would Be Frustrated If A Federal Defense Were a Prerequisite To Removal

Removal provisions, in one form or another, have been in force for most of the history of the Republic. "The purpose of all these enactments is not hard to discern" (*Willingham*, 395 U.S. at 406), and it extends far beyond the "narrow, grudging interpretation of § 1442(a)(1)" (*id.* at 407) offered by the court of appeals. To be sure, "*one* of [the] purposes [of removal] was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties" (*id.* at 405 (emphasis added)); but the removal statute also performs a broader function, which is "to protect federal officers from interference by hostile state courts" (*ibid.*) by ensuring that those charged with a crime under state law receive a "trial upon the merits of the state-law question free from local interests or prejudice" (*Arizona* v. *Manypenny*, 451 U.S. at 242). See also *Colorado* v. *Symes*, 286 U.S. at 517; *Soper (No. 1)*, 270 U.S. at 32; *Tennessee* v. *Davis*, 100 U.S. at 263.

"The original removal statutes were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of the federal government by the state." *Pennsylvania* v. *Newcomer*, 618 F.2d 246, 250 (3d Cir. 1980). The Ninth Circuit's decision, which makes a "federal defense" a prerequisite to removal, thus defeats the primary purpose of the removal statute. The court of appeals simply dismissed the "federal interest in ensuring that [petitioners'] trial be unbiased" as too "attenuated" to "justify an invasion of the state's authority to police its streets" (Pet. App. 11a). But "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum" and it is not for the court of appeals to frustrate that policy with "a narrow, grudging interpretation of § 1442(a)(1)" (*Willingham* v. *Morgan*, 395 U.S. at 407).[13]

The courts of appeal, at several points in its opinion, acted as if its decision were limited to postal worker traffic cases. For example, the court stated (Pet. App. 13a) that "[t]here is simply no reason to believe that, on a systematic basis, postal workers will not get a fair shake in state court." See also *id.* at 14a ("Congress could not have intended 28 U.S.C. § 1442(a)(1) to turn the federal courts into a special traffic court for federal employees."); *ibid.* (noting that "the overcrowded district courts" should not be troubled with such "pesky cases"). The court intimated (*id.* at 13a) that if there were an allegation that the state was bringing a prosecution "to frustrate or impede the performance of federal duties," then "a different, and more difficult, case" for removal would be presented. But the court fails utterly to explain how such a possibility is left open by its ruling.

On the contrary, unless removal is to depend upon a district judge's ab initio, ad hoc evaluation of the merits of the case, a federal official whose defense to a state criminal charge is a denial of the act alleged would be precluded from removal even in the face of

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[13] Furthermore, all but the procedural aspects of the removed case will still be governed by state law. *Arizona* v. *Manypenny*, 451 U.S. at 241. "Thus, while giving full effect to the purpose of removal, this Court retains the highest regard for a State's right to make and enforce its own criminal laws" (*id.* at 242-243).

clear evidence that the state is deliberately attempting to thwart federal policy by bringing the case. "The removal statute reflects no intention on the part of Congress to deny such an entirely innocent federal employee the benefit of a federal forum" (Pet. App. 18a (Noonan, J., dissenting)). Indeed, federal policy can be disrupted more readily by false charges than by the relatively rare circumstance of otherwise legitimate charges that are expressly precluded by federal law. In either instance, the federal interest in ensuring a federal forum is the same. The decision below thus presents a potential threat to federal supremacy anywhere federal policies encounter local hostility. The fact that such concerns are not implicated in the instant case is irrelevant to the proper construction of the removal statute.[14] If the statutory entitlement of federal employees to removal without assertion of a federal defense is lost in this context, it is also lost "in the context of civil rights law or some realm of federal authority likely to encounter antagonism in state court" (*id.* at 13a).

Each petitioner is charged with a crime for an alleged violation of state law committed while driving a mail truck in the course of delivering the United States mail. As the Court stated in *McClung*, 119 U.S. at 461, "[s]uch a suit is removable, and certainly the right to a removal is not taken away

[14] The diversity jurisdiction of federal district courts (U.S. Const. Art. 3, § 2; 28 U.S.C. 1332) was established, like the removal authority of federal employees, because "foreign" individuals might be viewed with a hostile eye by local courts. *Dodge* v. *Woolsey*, 59 U.S. (18 How.) 331, 354 (1855); *The Federalist* No. 80 (A. Hamilton). No showing of potential bias is required, however, to justify that jurisdiction in individual cases.

because the [federal official] says in his defence that the act charged was not in fact done. If done by him it was done under color of his office. The thing to be tried is whether it was done." Petitioners, like any other federal employees "undertak[ing] to perform their official duties" and not simply acting "in the ambit of their personal pursuits" (*Screws* v. *United States*, 325 U.S. at 111), "should have an opportunity to present their version of the facts to a federal, not a state, court" (*Willingham*, 395 U.S. at 409). There is no "pesky" case exception to the removal statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 28 U.S.C. 1442(a)(1) allows a federal employee charged with committing a traffic offense while on duty to remove the ensuing prosecution to federal court where the employee does not allege a defense to the charges based upon any right, duty, privilege, or immunity provided under federal law?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 87-1206

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

This Court is presented with two otherwise ordinary traffic cases. Petitioner Shabbir A. Ebrahim was given a traffic ticket for speeding and failing to yield after he struck a police car with the mail truck he was driving. Petitioner Kathryn Isabella Mesa was charged with misdemeanor vehicular manslaughter after she struck and killed a bicyclist with the mail truck she was driving.

Each mail carrier filed a petition for removal based solely upon their having been federal employees on duty when the incidents occurred. Neither petitioner alleged that his/her actions were justified by federal law. There has been no suggestion that these prosecutions were motivated by animus toward federal officials or federal law.

The United States District Court for the Northern District of California simultaneously granted the petitions and denied the State of California's motions for remand. California sought review by the Ninth Circuit Court of Appeals by direct appeal and mandamus.

The Ninth Circuit held that mandamus was available to challenge the District Court's decision, and petitioners do not challenge that ruling. The Ninth Circuit found that removal was prohibited by this Court's decision in *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33-35 (1926), which required that the employee have alleged in his petition a defense to the state charges based upon federal law. *People of the State of California v. Mesa*, 813 F.2d 960 (9th Cir. 1987). This Court granted certiorari.

SUMMARY OF ARGUMENT

Petitioners seek to expand federal jurisdiction radically at the expense of State sovereignty and common sense. Petitioners' theory would allow federal employees to force local prosecutors to travel hundreds of miles from county seats to federal courthouses to contest traffic tickets and other criminal offenses completely unconnected with federal law or authority. The tactical advantage of such a procedure will ensure its use, and create a separate criminal court for federal employees. District courts will be burdened with new cases presenting purely state law issues. Those cases will generate a disproportionate number of appeals because there is uncertainty concerning the proper incorporation of state procedural and substantive law into federal criminal procedure.

Such an expansion of federal jurisdiction would breach this Court's fundamental policy against federal interference with state criminal prosecutions, and is both unnecessary and contrary to the intent of Congress in enacting section 1442(a)(1). Petitioners rely upon their construction of other statutes dissimilar in language and heritage to section 1442(a)(1) because the structure and history of section 1442(a)(1) demonstrates that Congress has always required a federal defense for removal. This is not a case where this Court must choose between two plausible statutory constructions based upon the desirability of the result, although the difficulties posed by creating a separate criminal court for federal officials would tip the balance in favor of California. Rather, petitioners' construction of section 1442(a)(1) renders both section 1442(a)(3) and the Federal Drivers Act (28 U.S.C. 2679(b)) superfluous.

It also ignores the distinction made by Congress between "under color of office" and "in performance of duties". A chronological view of the legislative history illuminates that distinction and demonstrates that Congress has always intended to require a federal defense under section 1442(a)(1).

When it enacted the first federal official removal statute, Congress only intended to protect federal law against defiance or misinterpretation by State courts. Congress did not provide for removal of all torts and petty crimes committed while on duty, as those cases did not present a challenge to federal law. Moreover, that first statute was enacted before it was clear that Article III, section 2, permitted federal jurisdiction over state court judgments presenting *federal* questions. *See Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). Congress would not have provided for removal of cases presenting purely state law issues under those circumstances. Indeed, removal of these cases would still violate Article III because these traffic offenses do not present federal questions.

Petitioners concede that Congress retained its original intent when it enacted subsequent removal statutes. The history of those enactments confirms that Congress intended to protect federal law by requiring a federal defense for removal.

The lack of cases allowing removal confirms that conclusion. There are no reported cases decided before 1980 (when the Third Circuit "reinvented" Congressional intent), allowing removal where the federal employee did not rely upon his enforcement or compliance with federal law as a defense. Certainly officials sued for miscellaneous torts or prosecuted for petty crimes in "hostile" states would have produced

hundreds of reported decisions over 165 years had there been no federal defense requirement. The absence of a case explicitly allowing removal without a federal defense, combined with the absence of such reported decisions, is only consistent with the federal defense requirement.

Finally, the decisions of this Court in both civil and criminal cases uniformly mandate the federal defense requirement once the term "federal defense" is understood as including all cases where the official's defense raises issues of federal law. Petitioners ignore the official's claim of federal immunity in many of those decisions, and are unable to explain this Court's denial of removal to on-duty officials in the remainder.

ARGUMENT

I.
CONGRESS ALWAYS INTENDED TO REQUIRE A FEDERAL DEFENSE FOR REMOVAL

A. Reading Section 1442(a) As A Whole Establishes That Congress Required A Federal Defense For Removal

Section 1442(a)(1) allows removal for suits and prosecutions for acts "under color of office". That

phrase is inherently ambiguous.[1] Petitioners claim it mandates removal of suits and prosecutions for any acts committed by officials in performance of their duties. But reading section 1442(a) as a whole prohibits that construction. Section 1442(a)(3) allows removal to "[a]ny officer of the courts of the United States, for any Act under color of office ***or*** in the performance of his duties" (emphasis added). Terms connected in the disjunctive are to be given separate meanings. *See Garcia v. United States*, 469 U.S. 70, 73 (1984), *Reiter v. Sonotone*, 442 U.S. 330, 339 (1979). Thus, "under color of office" must restrict removal to something less than all acts committed while on duty. The only logical reading of section 1442(a)(1) is that "under color of office" refers to acts which the official seeks to justify or immunize by the laws creating and protecting his exercise of federal authority (i.e. his "office").

In addition, petitioners' reading of the phrase "under color of office" in section 1442(a)(1) must be rejected because it would allow court officers to remove cases based upon any act committed while in performance of their duties under section 1442(a)(1), rendering all of section 1442(a)(3) superfluous. *See Jarecki v. Searle & Co.*, 367 U.S. 303 (1961) (this Court reads statutes as a whole and seeks to give effect to each section).

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[1] Petitioners do not address the "plain meaning" of "under color of office". Rather, they attempt to construe section 1442(a)(1) *in pari materia* with other statutes purportedly united by a common purpose and legacy. AB 9-12, 27. The failure of that attempt is discussed below after examination of the legislative history of section 1442(a)(1).

B. The Legislative History of Section 1442(a)(1) Demonstrates That Congress Always Required A Federal Defense For Removal

The history of the removal statutes set forth below demonstrates that Congress employed removal sparingly, as befits a threat to State sovereignty. From the outset, Congress crafted the removal statutes to protect only certain federal laws from State misinterpretation or defiance. Congress periodically reenacted removal statutes protecting different classes of federal officials only when the laws which those officials enforced were the subject of State hostility. Protecting federal officials who enforced federal law was the only mechanism available to protect the law itself. Congress provided for removal to protect enforcement of federal law, not to allow federal officials to remove all torts or crimes committed while on duty.

1. Congress enacted the first federal official removal statute solely to provide an efficient mechanism to transfer suits challenging federal authority to federal court before trial.

Section 25 of the Judiciary Act of 1789 (1 Stat. 85) provided for removal after trial of state court judgments purporting to invalidate federal law or authority exercised under federal law. There was no provision for removal of cases lacking federal questions. Indeed, when the first federal official removal statute was enacted in 1815, this Court had yet

to rule that federal courts could review *any* state court judgments, even those presenting federal questions. *Compare* Act of February 4, 1815, 3 Stat. 198 ("1815 Act") with *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (decided after Congress enacted the 1815 Act). Congress would not have attempted to expand federal jurisdiction to include cases presenting no federal questions under such circumstances. Rather, the legislative history of the 1815 Act demonstrates that it was only a modest and temporary extension of the Judiciary Act.

The 1815 Act was proposed to protect federal customs agents in their enforcement of federal law against States sympathetic to smugglers during the 1812 War. The only available legislative history for that Act consists of a letter from its proponent, the Secretary of the Treasury. *See* Annals of Congress, 13th Cong., 3d Sess. at 757-61 (also appearing in the American State Papers, 1802-15, Finance, at 881). The Secretary related that the Vermont courts were frustrating the enforcement of federal law by routinely granting civil judgments against customs officials for seizures authorized under federal law. Under the Judiciary Act, decisions in such civil cases could only be removed to federal courts *after* the judgment was affirmed by the highest court in the State. That delay would allow Vermont to forestall review until after the war ended.

The Secretary wanted to allow removal of civil cases before adjudication by any State court. *Id.*, at 760. The Secretary only intended to adjust the Judiciary Act for the duration of the war to allow immediate transfer to federal court of State challenges to federal law authorizing searches and seizures by

customs inspectors. He quoted section 25 of the Judiciary Act as allowing removal of cases "where is drawn in question the validity of an authority, exercised under the United States (as in the case of an official of the customs,) and the decision is against the validity." *Id.*, at 760 (quoting the Judiciary Act). His proposal mirrors the Judiciary Act, except that he suggested that removal occur before trial.

> "A more effectual provision should be made for transferring, from the State courts to the Federal courts, suits brought against persons *exercising* an authority under the United States, so that such suits may be transferred, as soon as conveniently may be, after they are commenced."

Id., at 761 (emphasis added). Congress passed the 1815 Act, which allowed certain officials and those assisting them to remove civil and criminal cases where the charged acts were "agreeable to the provisions of this act, or under colour thereof" until the war ended. 1815 Act, secs. 8, 13. Thus, Congress allowed removal of suits only where the validity of the authority "exercised" by the official was relied upon as a defense. Congress was only worried about preserving federal law. Protecting officials relying upon that law was necessary to ensure its enforcement.[2]

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[2] Although there is no case law construing the 1815 Act, one of the briefs filed in *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), suggests that contemporaries understood that Act to allow removal only when the revenue officer alleged a defense based upon federal law. "A revenue officer may commit a trespass

(continued...)

2. Subsequent reenactments of the federal official removal statute maintained the federal defense requirement

The provisions of the 1815 Act were revived during the next State-Federal conflict, when South Carolina purported to nullify the federal tariff by passing the Nullification Act in 1832. *See* Act of March 2, 1833, 4 Stat. 632, sec. 3 ("1833 Act"). The Senate debate indicates that Congress did not intend to expand federal jurisdiction.[3] The 1833 Act tracked the

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[2](...continued)
while executing his official duties, and *if he justifies under the statutes of the United States, a question will arise under them*, in which an appellate jurisdiction is given to this court, to correct the errors of the state courts. But could Congress give additional jurisdiction to the federal courts, in all suits brought by or against revenue officers?" *Id.*, at 814 (emphasis added).

The absence of case law is also evidence that Congress maintained a "federal question" requirement. A sudden expansion of jurisdiction to encompass all torts committed by federal employees would have sparked litigation well before the brief was filed in *Osborn* in 1824.

[3] Petitioners rely upon Senator Webster's concern that federal officials would not receive a fair trial from jurors who had sworn allegiance to the Nullification Act. AB 13-14. But the Senator did not suggest that federal officials could not receive a fair trial because of universal hostility to federal officials. Rather, he argued that allowing trial in South Carolina's courts would be futile because jurors were sworn to support the Nullification Act in defiance of the federal *law* upon which the official would rest his (continued...)

language of the 1815 Act. Most important, courts understood that a federal defense was required for removal. *See Salem & L.R. Co. v. Boston & L.R. Co.*, 21 Fed. Cas. 229 (1857) (No. 12,249) (official must allege facts in petition demonstrating excuse or justification under the revenue laws).

The next federal official removal statute was enacted during the Civil War. The Act of March 3, 1863, sec. 5, 12 Stat. 756, ("1863 Act") provided for removal where the official acted "by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress." *Id.* This statute by its plain terms required a federal defense.

This Court confirmed that requirement in three cases. In *The Mayor v. Cooper*, 73 U.S. 247 (1867), the Court upheld the constitutionality of the 1863 Act[4] based upon the power of federal courts to hear *federal* questions. *Id.*, *see also The Justices v. Murray*, 76 U.S. 274 (1869) (noting that the 1863 Act only allowed removal of federal questions). In *McKee v. Rains*, 77 U.S. 22 (1870), a United States Marshal was sued for

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[3](...continued)
defense. Thus, removal was needed to "give a chance to the officer to defend himself *where the authority of the law was recognised* (sic)." 9 Congressional Debates, Part II, 22nd Cong., 2d Sess., at 461 (same remarks of Sen. Daniel Webster) (emphasis added), 419 (statute would frustrate attempts by States to preclude an official from "appealing to the constitution and laws under which he acted") (Sen. Dallas), 260 (Sen. Wilkins).

[4] The Court construed the 1863 Act as amended by the Act of May 11, 1866, 14 Stat. 46. The changes to the Act were not significant for the issue presented here.

trespass after entering a dwelling and seizing property pursuant to a writ of execution. This Court rejected his petition for removal under the 1863 Act because "[n]o Act of Congress has been cited from which authority can be derived to the Marshal of any court of the United States to seize the goods of one person for the satisfaction of the debts of another." *Id.*, at 25. Although the Marshal was in performance of his duties when executing a court order, he was denied removal because he could not base his defense upon federal law.[5] Petitioners cannot reconcile *McKee* or the 1863 Act with their theory that Congress always intended to allow removal for acts "in performance of duties."

The next removal statutes were part of internal revenue laws.[6] The Act of July 13, 1866 was the first

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[5] Although the Marshal was also clearly enforcing federal law by enforcing a court order, the 1863 Act required that the official act under authority "derived from the President of the United States, or from an Act of Congress." Court orders were held not to be covered by the Act. *See Buck v. Colbath*, 70 U.S. 334 (1865). As discussed *infra*, at page 14, this problem prompted Congress in 1916 to add section 1442(a)(3) protecting court officers.

[6] The 1833 Act applied only to collection of duties on imports. The Internal Revenue Act of June 30, 1864, ch. 173, section 50, 13 Stat 241 ("1864 Act"), provided that the 1833 Act was to be "taken and deemed as extended to and embracing all cases arising under the laws for the collection of [revenue]." That provision was repealed and replaced in 1866 with a different removal statute. *See* Act of July 13, 1866, ch. 184, section 67, 14 Stat. 98, 171 ("1866 Act"), *Gay v. Ruff*, 292 U.S. 25 n.8 (1934). That Act was codified in 1874 as section 643 of the Revised Statutes, and recodified as Section 33 of the Judicial Code of 1911, 36 Stat. 1097.

statute to use the phrase "under color of office" in providing for removal. Congress did not discuss this new language, and this Court's view of the federal defense requirement did not change. "That the act of Congress does provide for the removal of criminal offenses against the State laws, *when there arises in them the claim of the Federal right or authority, is too plain to admit of denial.*" *Tennessee v. Davis*, 100 U.S. 257, 261 (1880) (emphasis added). Again, this Court required a federal defense.[7]

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[7] This Court upheld the constitutionality under Article III of section 643 of the 1874 Revised Statutes (*see supra* note 6) based upon the assumption that a federal defense was required for removal. Petitioners' theory that *Davis* did not require a defense based upon federal authority is refuted by virtually every sentence of that case. *Id.*, at 271, 272 (allowing removal of prosecutions where "there arises a federal question" or in which "there arises a defence under United States law"). Petitioners argue that *Davis* did not require a federal defense because "self-defense" is a "state-law" defense. AB 19-20, n.7. But petitioner concedes that this Court stated in *Maryland v. Soper (No. 2)*, 270 U.S. 36 (1926), that acts of self-defense are "part of the exercise of official authority." *Id.*, at 42. The official in *Davis* relied upon the federal immunity defense, very much a "common law of 'justification' applicable to crimes committed by federal employees in the performance of their duties." AB n.7, *see Arizona v. Manypenny*, 451 U.S. 232, 236-37 (1981), *In re Neagle*, 135 U.S. 1 (1890), Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U.Pa.L.Rev. 793, 874 n.328 (1965) (*Davis* demonstrates the rule under section 1442(a)(1) that the official must show colorable protection under federal law), Currie, *The Constitution in the Supreme Court, The First Hundred Years, 1789-1889* (1985), 393-94 n.172 (recog[illegible]ng that *Davis* was a federal immunity case).

(continued...)

3. The addition of section 1442(a)(3) in 1916 is compelling evidence that Congress maintained the federal defense requirement

Congress added section 1442(a)(3) in 1916. As discussed above, that amendment allows a court officer to remove civil and criminal actions "for or on account of any act done under color of his office ***or*** *in the performance of his duties as such officer.*" *Id.* (emphasis added). Petitioners' reading of "under color of office" as referring to all acts in performance of duties not only renders section 1442(a)(3) superfluous

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[7](...continued)
Although the district court in *Georgia v. Grady*, 10 Fed. Cas. 245 (1876) (No. 5,352) (AB 20-21) chose to couch the necessary and proper test later set forth in *In re Neagle*, in terms of state law with which the jury might be more familiar, the gravamen of the defense still remains reliance upon federal authority.

The officer in *Davis v. South Carolina*, 107 U.S. 597 (1882), also alleged a federal immunity defense. This Court noted that the official relied upon federal law as justifying his presence at the scene. *Id.*, at 600. The official's petition averred that the shooting occurred only after the fugitive attempted to evade arrest, and that the fugitive's sudden appearance had frightened his horse and caused his firearm to discharge. *Id.*, at 598. Thus, the official alleged that his acts while on duty were necessary and proper because the firearm discharged as a result of his attempt to enforce federal law (i.e. guarding the house when the fugitive emerged). Although this immunity defense might not prevail at trial, it was certainly "colorably" alleged for purposes of removal. *See In re Neagle*, *Willingham v. Morgan*, 395 U.S. 402 (1969) (discussed in a later section in this brief).

as read today, but makes no sense historically.

Petitioners claim that Congress read both phrases as "coterminous." AB 26. But this does not explain why Congress added "in performance of duties" to section (a)(3) if "under color of office" achieved the same result. Nor does it explain why Congress added section (a)(3) at all, instead of simply amending section (a)(1) to include court officers.

This Court's decision in *Gay v. Ruff*, 292 U.S. 25 (1934), indicates that Congress intended both phrases to encompass only those acts justifiable by federal law or authority. Defendant in *Ruff* was a receiver appointed by federal court order to run a railroad. Plaintiff sued the receiver for the death of his son allegedly caused by the negligent operation of a train by railroad employees. The receiver sought removal under section 1442(a)(3) based on his having been a court officer when the incident occurred.

This Court held that the receiver was a court officer for purposes of section 1442(a)(3). *Id.*, at 39. But this Court also noted that the case was *dissimilar* to cases removable under section 1442(a)(3) *because no federal questions were presented.* *Id.*, at 34. (Petitioners' construction would require removal in the absence of a federal question.) This Court denied removal, holding that Congress only intended "in performance of duties" to protect court officers relying upon the federal authority embodied in the court order. *Id.*, at 35, 38-39. Thus, even that broader phrase requires reliance upon federal authority.

This Court also rejected petitioners' construction of the phrase "under color of office", which appears in sections 1442(a)(1) and (a)(3). Petitioners read "under color of office" as allowing removal for all acts

committed while on duty. Under that construction, the receiver in *Ruff* should have been allowed removal because he was accused of negligence in performing his duties. But *Ruff* held that the receiver could not have been acting "under color of office" under section 1442(a)(3) because he had no federal defense. *Id.*, at 39 ("nor is there reason to assume that he will in this case rest his defense on his duty to cause the train to be operated").[8]

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[8] That the two phrases are not "coterminous" is demonstrated by the motive of Congress in adding section 1442(a)(3). Court officers serving arrest warrants for violations of revenue laws could remove to federal court under section 1442(a)(1) by raising a federal immunity defense based upon their duty to enforce those laws. *See Tennessee v. Davis*, *supra*, *Davis v. South Carolina*, *supra*. However, section 1442(a)(1) referred only to revenue laws. Court officers executing court orders where the underlying authority for the order was *not* a revenue law were held to be unprotected by section 1442(a)(1). *See Gay v. Ruff*, 292 U.S. 25, 37-38 (1934). This Court had held that federal law did not protect those court officers when sued in state court for a variety of torts even though those suits were based upon the officer's execution of a court order. *See McKee v. Rains*, *supra*, *Bigelow v. Forrest*, 76 U.S. 339, 348 (1869), *Buck v. Colbath*, 70 U.S. 334, 342-44 (1865). The defense of federal immunity per the revenue laws, and thus removal, was unavailable to those officers.

Congress sought to provide court officers with the same protection afforded to revenue officers *and* to members of Congress. *Ruff*, at 38-39 (quoting House Judiciary Committee report). Since revenue officers were allowed to remove acts committed "under color of office", that phrase was also included within section 1442(a)(3). But additional protection was needed because of this Court's decisions holding that federal law did not provide a defense to suits challenging the marshal's execution of

(continued...)

Only two years before *Ruff*, this Court had construed *section 1442(a)(1)* as prohibiting removal where the federal official failed to present a federal defense. *See Colorado v. Symes*, 286 U.S. 510 (1932). Petitioners suggest that this Court denied removal because the official did not provide enough information to allow the Court to determine if he acted in "proper discharge of his duty". AB 23-24. But the official's detailed narrative established at the very least that he acted in performance of his duties. *Id.*, at 516-17. This Court denied removal because the official failed to establish a federal immunity defense.[9] Petitioners'

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[8](...continued)
court orders. Section 1442(a)(4), added in 1875, allows members of Congress to remove any suit on account of "any act in the discharge of his official duty *under an order of such House*." *Id.* (emphasis added). Congress incorporated this protection of all acts committed pursuant to federal authority into section 1442(a)(3) by adding the phrase "in performance of duties." *Ruff*, at 39.

Had Congress read "under color of office" as protecting all acts committed while on duty (*see* AB 26), then it would not have added another section to subsection 1442(a). Congress simply would have amended section 1442(a)(1) to include court officers. But Congress needed to add protection that petitioners claim was already present. California's reading of the two phrases is the only reading consistent with *Ruff* and the history and intent of the 1916 Act. Petitioners' reading defies common sense by making "under color of office" broader than "in performance of duties".

[9] "The statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of essential details of the *defense* he claims. They are not sufficient to enable the court to determine whether his *claim of immunity* rests on any substantial basis or is made in good faith." *Id.*, at 521 (emphasis

(continued...)

construction of "under color of office" has been refuted repeatedly by this Court.

4. Congress did not eliminate the federal defense requirement when it enacted the present statute

Congress amended section 1442(a)(1) to include "[a]ny officer of the United States or any agency thereof" as part of the Revision of the Judicial Code in 1948. The Reviser's Note to that section states only that the Revision extended the right to remove to all federal employees. Petitioners concede that the extension of protection to all federal employees did not change the character of that protection. AB 16. This Court has repeatedly held that changes in language made during the 1948 Revision are presumed not to have changed the scope and meaning of the statute unless Congress clearly expressed such an intent in the Reviser's Notes. *See Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 226 (1957), *see also Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 318 (1985), *Muniz v. Hoffman*, 422 U.S. 454, 467-74 (1975) (collected authority).

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[9](...continued)
added). As discussed in a later section, this Court in *Maryland v. Soper (No. 1)*, *supra*, required officials seeking to allege an immunity defense to make a complete account of the incident prompting prosecution to ensure that all acts which could form the basis of that prosecution were protected by federal law. In *Symes*, this Court held that the official had failed to give a sufficiently complete account. *Id.*, at 519-20 (citing *Soper (No. 1)*).

5. The Federal Drivers Act is further evidence that Congress still requires a federal defense for removal

Congress in 1961 refuted petitioners' vision of federal official removal when it added the Federal Drivers Act (28 U.S.C. 2679(b)), allowing federal officials to remove *civil* suits arising out of the performance of their duties. The Act provides for removal of civil suits against federal drivers upon certification by the Attorney General that the incident occurred while the official was performing his duties. It does not encompass criminal cases. This section would be superfluous under petitioners' construction of section 1442(a)(1). The Federal Drivers Act was necessary because section 1442(a)(1) does not allow removal in the absence of a federal defense.[10]

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[10] Although the Federal Tort Claims Act (28 U.S.C. 1346) provides for removal of tort suits against the United States pursuant to that Act, plaintiffs could still sue employees individually in state courts until 1961. Congress enacted the Federal Drivers Act to protect those employees against suits alleging negligent driving, which did not give rise to a federal defense. *See* Comment, *Katlein, Administrative Claims and the Substitution of the United States as Defendants Under the Federal Drivers Act: The Catch-22 of the Federal Tort Claims Act?*, 29 Emory L.J. 755, 761-63 (1980).

6. This Court has held that section 1442(a)(1) is not *in pari materia* with civil rights laws

Statutes may be considered *in pari materia* only if they share the same object. *Erlenbaugh v. United States*, 409 U.S. 239, 243-45 (1972). This Court held in *Screws v. United States*, 325 U.S. 91, 111 (1945), that the language "under color of law" in the civil rights statutes cannot be construed *in pari materia* with the phrase "under color of office" in section 1442(a)(1) precisely because the statutes were enacted for different purposes. *Id.*, at 111-12. The civil rights laws were enacted to punish state or federal officials who deprived others of their constitutional rights under the assumption of authority. Insistence that the official had acted within his federal authority would have vitiated the statutory purpose of punishing abuse of power. *Id.* Section 1442(a)(1), in contrast, was enacted to protect federal law by protecting officials relying upon that law in state courts. Restricting removal to cases featuring federal defenses makes sense.

That the dissent would have construed civil rights laws in accordance with section 1442(a)(1) does not help petitioners, since the dissent, *along with the majority*, construed "under color of office" as requiring the official to justify his conduct under federal law. *Id.*, at 111-112, 145-46. Petitioners cannot reconcile *Screws* with their construction of section 1442(a)(1). *See also Gay v. Ruff*, *supra*, *Colorado v. Symes*, *supra*, *Maryland v. Soper (No. 1)*, *supra*, *Tennessee v. Davis*, *The Mayor v. Cooper*, *The Justices v. Murray*, *McKee v. Rains*, *supra*.

II.
THIS COURT HAS NEVER ABOLISHED THE FEDERAL DEFENSE REQUIREMENT

A. This Court's Decision In *Cleveland v. McClung* Is Consistent With The Federal Defense Requirement

When a railroad company holding a lien on certain freight informed customs collectors of that lien, federal law required the collectors to notify that railroad before releasing the freight to a consignee or owner. The collectors were not allowed to release the freight until the owner discharged the lien. *Cleveland C. & c. R.R. v. McClung*, 119 U.S. 454, at 454-55. Plaintiff in *McClung* was a railroad holding a lien on particular goods. Defendant was the customs collector bearing responsibility for notifying plaintiff and holding those goods once they arrived at the station. Plaintiff alleged that defendant had allowed his deputy on prior occasions to release goods to the consignees after collecting the amounts due on the liens. The deputy would then deliver the money to the railroad. Plaintiff complained that the deputy on one occasion had failed to turn over the money, and sought to hold the defendant responsible for the deputy's omission. *Id.*, at 454-55, 461, 462.

Plaintiffs alleged that defendant had failed to adhere to federal law by allowing his deputy to release the goods without notification. *Id.*, at 456. Defendant's petition stated that he had at all times acted "under color of office". After removal, defendant claimed that it was not his duty under federal law to collect money for the lienholders, and that he was

therefore not responsible for his deputy's alleged failure to pay that money to the railroad. *Id.*, at 461. He also claimed that since the money had already been paid and the lien discharged, he had no duty under federal law to notify the railroad or retain the goods. *Id.*, at 458.

This case is confusing because, unlike the instant cases, defendant was accused of violating *federal* law. That allegation necessarily put the interpretation of federal law into issue as a defense. Moreover, while defendant's petition by today's standards was overly cryptic, he alleged a federal defense by stating in effect that he defended the charges based upon his duties (or lack thereof) under federal law. *Id.*, at 456. Thus, the Court proceeded to evaluate the case against the collector in those terms.

> The real question here is, therefore, whether the collection of the carrier's charges was a part of the official duty of the collector. If it was, the collection by the deputy was an official act, and the principal officer is liable accordingly.

Id., at 462. The Court found that the collector's federal defense was valid, and affirmed the lower court's instruction to the jury on that defense. *Id.*, at 463. The Court also stated that the defendant's denial of the allegation did not vitiate his right to removal. That ruling was correct because removal depends upon the allegations in the petition; officials may rely upon any defense at trial. The instant cases present no federal issues because petitioners do not defend their allegedly negligent driving by recourse to federal law.

B. The "Causal Connection" Test Employed in *Willingham* Was Developed To Provide A Remedy For Harassment And Assumes The Federal Defense Requirement

Petitioners' interpretation of this Court's recent authority is easily stated. Petitioners observe that *Willingham v. Morgan*, 395 U.S. 402 (1969), granted removal in a civil case where the official had alleged only that he was on duty. They quote the language in *Willingham* stating that the official was entitled to removal because he had established a "causal connection" between the charged act and his official authority. AB 17. And they note that section 1442(a)(1) does not distinguish between civil and criminal cases on its face. Petitioners conclude that this "causal connection" test allows them removal in these criminal cases because they too alleged only that they were on duty.

California *agrees* that the test for removal is identical for civil and criminal cases, but suggests that petitioners misunderstand the "causal connection" test. As discussed herein, this Court has always held that a federal defense is required for all cases. Petitioners' argument collapses because they assume that the "causal connection" test outlined in *Willingham* is the exclusive test for removal. But that test already assumes that the federal official attempts to justify his conduct by relying upon federal law. The "causal connection" test only defines what facts must be alleged to put that federal defense into issue. This distinction is critical and is illustrated by *Maryland v. Soper*, 270 U.S. 9 (1926) ("*Soper (No. 1)*").

The "causal connection" test arose out of the

problem posed by petitioners: the official who is harassed by State authorities attempting to frustrate Federal policy. *See* AB 7, 8, 27, 29-30. Petitioners' suggestion that officials may remove prosecutions without admitting having committed the charged act and alleging that the act was justified under federal law is not new. *Cf.* AB 6, 8, 22-23, 31. But the suggestion arose in a different context.

It was assumed that the official had to allege a defense to the charges based upon federal law. *See Tennessee v. Davis*, *supra*. However, occasionally an official would be disabled from pleading a federal defense to the prosecution by the usual method, which was to admit having committed the charged act and to justify those acts under federal law. This occurred when the official had no knowledge of the incident prompting the prosecution.

In *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), prohibition agents discovered a homicide victim while raiding an illegal still. They reported their discovery to local authorities and were promptly arrested for murder. The agents had a choice. They had no knowledge of the homicide. If they admitted killing the decedent, they falsely incriminated themselves. Moreover, since they had no knowledge of the incident, they were not in a position to assert that the killing was required by their duties. Their other alternative was to deny the killing and claim that they did nothing but their federal duty. But asserting that they did nothing but their duty did not necessarily put a federal defense into issue. One court refused to grant removal to an official who denied having committed the charged act, reasoning that the official, by denying having committed the charged act, had failed to allege a defense relevant to

the prosecution. *Compare Illinois v. Fletcher*, 22 F. 776 (N.D. Ill. 1884) with *Oregon v. Wood*, 268 F. 975 (D.Or. 1920), and *State of Alabama v. Peak*, 252 F. 306 (D. Ala. 1918).

Although that ruling may appear unfair, allowing removal based only upon a denial of the charges would have eliminated the federal defense requirement. In most cases, the ruling did not affect officials because they had knowledge of the incident and alleged a federal immunity defense justifying the charged act. *See Tennessee v. Davis*, *supra*, *South Carolina v. Davis*, *supra*. This Court in *Soper (No. 1)* created a means by which officials lacking knowledge of the incident could obtain removal while ensuring that prosecutions based upon acts *unjustifiable* under federal law remained in state courts.

To allow removal by an official lacking knowledge about the incident (the agents), there had to be a means of determining whether the prosecution, either deliberately or mistakenly, had been based solely upon the official's performance of federal duties. Even if the prosecutor's motive was innocently based upon the official's presence at the wrong place at the wrong time (i.e. the agent finding the decedent), such a prosecution would in effect penalize compliance with federal law and violate the Supremacy Clause. The Supremacy Clause would then supply the federal defense justifying removal. Otherwise, States could prosecute federal officials for offenses which they had not committed, knowing that the official would be unaware of the incident and thus be unable to formulate a federal defense sufficient for removal. The problem was how to put this Supremacy Clause defense in issue in the appropriate case.

It was clear that an official claiming no knowledge of the incident should have the burden of producing evidence that his presence and activities as a federal official prompted the prosecution. But too strict a test would require the official to prove his defense in order to proceed to trial in federal court, and would defeat the purpose of removal. And too lax a "causal connection" test would allow any official to obtain removal merely by denying having committed the act and claiming ignorance of the incident prompting prosecution.

The agents in *Soper (No. 1)* denied knowledge of the murder, but argued that they were entitled to removal because they had found the slain man while on duty. This Court fashioned a very strict test allowing the official lacking knowledge about the incident to allege a connection between his federal activities and the prosecution sufficient for removal. The official had to demonstrate the "causal connection" by: 1) detailing all of his actions and showing that each act was in enforcement of federal law; and 2) negating the possibility that he was prosecuted for an act unprotected by federal law.

> There must be a "causal connection" between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of Federal authority *and in enforcement of Federal law*, and he must by direct averment *exclude the possibility* that it was based on acts or conduct of his, *not justified* by his Federal duty. But the statute does not require that

> the prosecution must be for the very acts which the officer admits to have been done by him under Federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, *though mistaken or false*, of the state prosecution.
>
> * * * *
>
> The defense he is to make is that of his immunity from punishment by the State, *because what he did was justified by his duty under the Federal law*, and because *he did nothing else* on which the prosecution could be based.

Id., at 33, 34 (emphasis added).[11] By showing that each of his acts was indisputably in enforcement of federal law, the official declared that the only basis of the prosecution was either: 1) an act protected by a federal defense;[12] or 2) his mere presence at the scene

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[11] This Court required officials to waive their Fifth Amendment rights and give a complete account of their role in the incident. *Id.*, at 34, 35. Such a waiver would have been unnecessary if an official could obtain removal by alleging only that he was on duty, as such a statement could not be inculpatory.

[12] The "causal connection" test also applied where the official acknowledged having committed the charged act but alleged a federal defense. The Court, in the language quoted above, held that in order to put a federal immunity defense into issue, the official had to negate any inference that the prosecution could properly be based upon an act unprotected by federal law. This explains this Court's denial of removal in *Colorado v. Symes*,

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while enforcing federal law. *Id.* (language quoted above). As noted above, a prosecution based upon his mere presence would provide a Supremacy Clause defense. The phrase "it is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution" (*id.*) was intended to govern *only* those cases where the official alleged a lack of knowledge of the events underlying the prosecution.

That "presence" language required more than simply being on duty. Thus, this Court in *Soper (No. 1)* denied the removal petition because "[t]hese averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties." *Id.*, at 33. ***Petitioners not only misread Soper (No. 1), but rely upon the same allegation that was rejected in that case.***

The language in *Soper (No. 1)* suggests that in order to obtain removal based solely upon the official's presence at the scene, the official must demonstrate that: 1) he committed no acts other than those required by his duties; 2) there was a discernible reason for his prosecution, even though based upon mistake (or animus toward federal authority); and 3) the reason was connected with his having been present carrying out his duties at the time the charged act was allegedly

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[12](...continued)
supra. *See supra* note 9. This Court later relaxed this part of the "causal connection" test for the official immunity defense in civil cases in *Willingham*, *supra*, at n.4. *See infra* note 16. Petitioners do not allege any federal defense.

committed.[13] Petitioners fail to meet this test, and instead rely upon the language used by this Court in *Willingham* to justify removal.

Plaintiff inmate in *Willingham* sued his prison warden and doctor for maltreatment. *Willingham* is confusing because this Court had to reconcile its decision in *Soper (No. 1)* with the relatively new federal defense of official immunity. That doctrine had always shielded legislative and judicial officials for acts performed as part of their judicial functions. But after

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[13] Thus, this Court posed the hypothetical of a prosecution commenced "merely on account of the presence of the officer in discharge of his duties in enforcing the law, at or near the place of the killing, under circumstances casting suspicion of guilt on him. He may not even know who did the killing, and yet his being there and his official activities may have led to the indictment." *Id.*, at 33. This Court stated that removal was proper if the prosecution arose out of the officer's acts committed "under authority of Federal law in the discharge of his duty *and only by reason thereof*." *Id.*, at 33 (emphasis added).

It is not enough to show that the prosecution would not have occurred *but for* the official's physical presence at the scene, because such a test would be tautological. Had our petitioners not been at the scene of accidents by virtue of their driving, these prosecutions would not have occurred. The official must demonstrate that his mere presence enforcing or executing federal law was the proximate cause of the prosecution.

The official in *Soper (No. 1)* alleged that his identity and activity as a federal agent (and not just his presence at the scene as the reporter of the crime), was the proximate cause of his prosecution. This Court stated that such a showing might have been sufficient. However, this Court denied removal because the official had failed to provide enough information to negate an inference that he might have committed an act apart from his duties (i.e. by having shot the slain man). *Id.*, at 35-36.

deciding *Soper (No. 1)*, this Court had expanded that doctrine *for civil suits* to shield all federal officials who could show that the charged acts were committed as part of their official duties. *See Barr v. Matteo*, 360 U.S. 564 (1959).

The official immunity defense is a federal defense because it immunizes federal officials in civil cases; the scope of that immunity is a federal question.[14] However, this federal defense differed fundamentally from other defenses because the official could put it into issue by alleging only that he was performing his duties when he committed the act.[15] This difference posed a problem for lower courts because *Soper (No. 1)* in a criminal case had rejected the idea that an official could obtain removal by alleging only that he was on duty when the charged act was committed. *Soper (No. 1)* required defendant to provide a complete account of the incident and negate any inference that

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[14] This explains the distinction between the instant cases and the hypothetical federal officials posed in petitioners' brief. *See* AB 11-12. The FBI agents, the federal engineer, and the EPA inspector would rely upon official immunity as a defense to a civil suit, and upon federal immunity in a criminal action.

[15] This Court only recently resolved a split among the Circuits by holding that the official must allege that his act was discretionary in addition to having been committed while on duty. *See Westfall v. Erwin*, 484 U.S. __, 108 S.Ct. 580, 98 L.Ed. 2d 619, n.4 (1988). It was assumed in *Willingham* that the warden and doctor had the discretion to impose medical treatment. This Court ultimately allowed removal without requiring the official to allege that the charged act was discretionary. Whether *Westfall* affects the showing required to put the official immunity defense in issue is not relevant here.

he committed an act unprotected by federal law. That an official was on duty was not enough for removal under *Soper (No. 1)*. And there was no reason to believe that *Soper (No. 1)* did not apply to both civil and criminal cases. Thus, even though Congress intended to allow removal of all federal defenses per section 1442(a)(1), the court below in *Willingham* denied removal because it did not recognize official immunity as such a federal defense in light of *Soper (No. 1)*. *See Morgan v. Willingham*, 383 F.2d 139, 141 (10th Cir. 1967) (distinguishing between the breadth of the immunity defense and the scope of removal jurisdiction) (citing *Soper (No. 1)*), *reversed* in *Willingham v. Morgan*, 395 U.S. 402 (1969).

This Court in *Willingham* recognized this new defense of official immunity as a federal defense for purposes of section 1442(a)(1). *Id.*, at 406, 407. But, as in *Soper (No. 1)*, this Court had to determine what facts were sufficient to put that federal defense in issue. *See id.*, at 407-09. This Court was seeking to define what "causal connection" between the official's acts and the civil suit had to be shown in order to demonstrate that the official had a "colorable" official immunity defense. In *Soper (No. 1)*, this Court had required the officials to meticulously detail all of their actions with regard to the victim to negate the inference that an act unprotected by a federal defense was the basis of the prosecution. But such a strict test imposed a burdensome standard in *Willingham* because the defendant prison officials might have had dozens of contacts with plaintiff. *Id.*, at 408-09.

The solution was simple. The official immunity defense covered acts committed in the performance of duties. Thus, that federal defense could be put into

issue by alleging that all contacts between the officials and plaintiffs occurred while the officials were on duty. The Court merely eliminated, *for civil cases only*, the requirement that the official alleging a federal defense negate any inference that he had committed an act unprotected by federal law.[16] But petitioners' confusion arises from the Court's implementation of that decision. This Court elected to employ the "presence" language of the *Soper (No. 1)* decision in allowing removal.[17]

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[16] In *Soper (No. 1)*, even those officials who admitted the charged act and asserted federal immunity defenses had to negate any inference that they were prosecuted for acts unprotected by federal law. *See supra* note 12. This Court relaxed that requirement for civil cases, but stated in footnote 4 that it had not decided whether to relax that requirement for criminal cases. That issue is not presented here because petitioners do not present a federal defense.

[17] "Past cases have interpreted the 'color of office' test to require a showing of a 'causal connection' between the charged conduct and asserted official authority. *Maryland v. Soper (No. 1)*, *supra*, at 33. 'It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution.' *In this case*, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required 'causal connection'. The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times." *Id.*, at 490 (brackets in original, emphasis added).

Note, however, that this Court also made clear that the causal connection test was intended only to define the allegations necessary to put *federal defenses* in issue. "Petitioners sufficiently

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In hindsight, that decision was the source of later confusion. Averring that the official was on duty was sufficient to allege the official immunity defense. It was not sufficient to allege other federal defenses (e.g. federal immunity). But this Court in *Willingham* used some of the same language to define the "causal connection" test for the official immunity defense as it had used earlier in *Soper (No. 1)* to define the "causal connection" test for a defense based upon enforcement of federal law. *See supra* note 17. Lower courts considering cases where the official immunity defense was not available (i.e. criminal cases) could fail to understand that *Willingham* only defined the showing required to put the official immunity defense in issue. They could infer that *Willingham* mandated removal in *all* cases where federal employees merely alleged that they "were on duty, at their place of federal employment, at all the relevant times." *Willingham*, at 409.

However, this Court did limit its ruling to civil suits. *Willingham*, at n.4. *See supra* note 16. And there was no reason to believe that this Court had elected to overrule 100 years of precedent and radically expand federal jurisdiction when its purpose was to create a means of removing a new federal defense. Nonetheless, the Third Circuit read *Willingham* as having eliminated the federal defense requirement. *See Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d

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[17](...continued)
put in issue the questions of official justification and immunity; the validity of their defenses should be determined in the federal courts." *Id.* This Court did not abolish the federal defense requirement.

246 (3d Cir. 1980) ("*Newcomer*").

C. The Third Circuit's Decision Abolishing The Federal Defense Requirement Ignored Congressional Intent And Misinterpreted *Willingham*

The Third Circuit relied upon two arguments in dismantling the federal defense requirement in *Newcomer*. The Circuit stated that the original removal statutes "were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of federal government by the state." *Id.*, at 250. But this Court in *Willingham* did not suggest that view of legislative intent, and the Third Circuit presented no legislative history supporting it.[18]

The Circuit's second argument contradicted its first. Instead of relying upon its view of Congressional intent, the Circuit stated that "the liberal construction to be afforded the statute, *see Willingham*, at 406; *Colorado v. Symes*, 286 U.S. at 517, 52 S.Ct. at 637,

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[18] The Third Circuit relied instead upon *Tennessee v. Davis*, *supra*, and Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U.Pa.L.Rev. 793 (1965). As discussed above, the legislative history indicates that Congress was concerned with protecting federal law against State interference. Moreover, Professor Amsterdam cited *Davis* as an example of the rule under section 1442(a)(1) that the official must show colorable protection under federal law. *See supra* note 7. And the Third Circuit conceded that the official in *Davis* had alleged a federal defense. *Newcomer*, at 250.

and the interpretation of 'color of office' supplied by *Willingham compel* our result in this case." *Id.*, at 250 (emphasis added). Specifically, the Circuit relied upon the holdings in *Willingham* and *Soper (No. 1)* that the official need not admit that he committed the charged act in order to obtain removal. The Circuit reasoned that "in such a case, of course, the denial does not involve a federal defense." *Newcomer*, at 250. But *Soper (No. 1)* requires that such a denial must be accompanied by facts establishing a "causal connection" between the prosecution and the official's enforcement of federal law sufficient to implicate the Supremacy Clause. The denial ***is*** the allegation of a federal defense.

D. This Court's *Dicta* in *Arizona v. Manypenny* Supports The Federal Defense Requirement

Petitioners' attempt to deny the importance of federal immunity in *Arizona v. Manypenny*, 451 U.S. 232 (1981), is unconvincing. Although an immunity defense had not been alleged at trial, this Court assumed that the removal petition had made out a claim of federal immunity *and* that such a defense was necessary for removal.

> Federal involvement is necessary in order to insure a federal forum, but it is *limited* to assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law. Thus, while giving full effect to the purpose of removal, this Court retains the highest regard for a State's right to make and enforce its own criminal laws.

Id., at 242-43 (emphasis added).[19]

III.
ARTICLE III PROHIBITS REMOVAL OF CASES LACKING A FEDERAL DEFENSE

Article III, section 2, extends federal jurisdiction only to those cases "arising under" the laws or Constitution of the United States. *Id.* Article III on its face does not allow removal of these traffic cases because petitioners fail to raise federal defenses. California has argued that a reasonable construction of section 1442(a)(1) avoids the obvious constitutional difficulty posed by the absence of federal issues in these cases. *See Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984) (this Court will first determine whether a reasonable construction of the statute supporting the constitutionality of the statute exists). Should this Court disagree, California reluctantly requests this Court to declare section 1442(a)(1) unconstitutional insofar as it purports to confer federal jurisdiction in this case.

The dissent below suggests that the cases "arise under" Article III because the officials were employed to perform duties that were authorized by federal law. *See Mesa*, at 968 (Noonan, J., dissenting) (citing *Osborn v. Bank of the United States*, 22 U.S. 738, 823

[19] By "state-law questions", the Court referred to remaining defenses available to defendant under state law in addition to the federal immunity defense (e.g. lack of criminal intent, identity, etc.). *Id.*, at 241-42.

(1824) ("*Osborn*")). *Osborn* does not support jurisdiction here. The only other basis for jurisdiction beyond *Osborn* is the controversial and dubious theory of "protective jurisdiction".

A. Even The Broad Reading of "Arising Under" Jurisdiction Propounded In *Osborn v. Bank of United States* Does Not Confer Jurisdiction In This Case

Osborn has been described as reflecting a "broad conception" of Article III jurisdiction. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983). However, this Court has refused to hold that *Osborn* allows Article III jurisdiction over cases presenting only "potential" federal issues. *Verlinden*, at 492-93 (declining to decide whether "a mere speculative possibility that a federal question may arise at some point in the proceeding" is sufficient under Article III). The holding and reasoning of *Osborn* demonstrates that only those "potential" issues which are necessarily implied by plaintiff's complaint "arise" under Article III.

There are two types of cases which must be kept separate. First, there are cases where the character of the action always presents federal issues. These issues are "potential" because they may or may not be asserted, or "raised", by one or both of the parties in the action. Such issues may be so well-settled that it is highly unlikely that they will be "raised" by the parties (e.g. the right of the Bank of the United States to sue or contract). However, these issues are present at the outset of the case because it is apparent from the facts presented in the complaint (i.e. the status of the Bank

as a federal instrumentality) that the rights of the parties are dependent upon the resolution of those issues. The "original ingredient" test established by *Osborn* confers jurisdiction in such cases.[20]

The second class of cases encompasses suits where the facts of the case stated in the complaint do not automatically raise federal issues. Such cases can "arise under" Article III only if a party "raises" a federal issue that is dispositive of that lawsuit.[21] In the absence of an "original ingredient", *Osborn* does not allow a party to create jurisdiction merely by stating a set of facts from which a federal issue might, or might not, arise upon the development of other facts. *See Little York Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 203 (1887) (construing Justice Marshall's

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[20] This was the point of contention between the majority and dissent in *Osborn*. Justice Johnson, dissenting, stated that a federal issue did not "arise" for purposes of Article III until a party "raised" the issue. *Id.*, at 888-889. Justice Marshall decided that issues necessarily implied by the complaint, though well-settled and not raised by either party, presented federal issues sufficient for jurisdiction. *Id.*, at 824-25. But neither Justice Marshall nor Justice Johnson suggested that issues which were not necessarily implied by plaintiff's complaint, but could conceivably appear later in the action depending upon facts later presented, could serve as the foundation for Article III jurisdiction. *Id.*, at 825. *See Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 509-10 (1900) (interpreting *Osborn*).

[21] Although *Osborn* was read in later cases as having provided federal jurisdiction for suits against instrumentalities, that jurisdiction was based upon the requirement that plaintiff allege defendant's corporate and federal status in the complaint. *See Texas & P.R. Co. v. Cody*, 166 U.S. 606, 609-10 (1897).

language in *Osborn* as preventing removal under the admittedly narrower general federal question removal statute where a federal question only *might* be presented at a later point in the litigation).

Turning to the issue presented here, petitioners' status is not an "original ingredient" in these prosecutions. California is not required to allege that defendants are federal officials. California may prevail without first proving that petitioners did not act in enforcement of federal law, just as a plaintiff in an ordinary contract action need not show that his contract is unaffected by federal law. Furthermore, while the Bank's status created an actual federal issue in *Osborn*, petitioners' status as federal employees does not do so here. Federal employees are not "creatures of federal law" (*Osborn*, at 823), and the fact that they are employed by the United States when they commit the charged act does not create a federal issue. Justice Marshall recognized that the mere status of the Bank as an entity created by the United States could not by itself create federal jurisdiction.

> It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank. *This distinction is not denied.*

Id., at 826-27 (emphasis added). The same must be true for persons employed by an entity created by federal law, or else Article III jurisdiction would extend

to all suits by federal employees arising out of off-duty activities. Indeed, Justice Marshall's concession was prompted by the dissent's argument that focusing upon the identity of the party instead of the issues raised by the case would create jurisdiction for any case involving federal officials. *Id.*, at 901-02. Justice Marshall did not rely upon the status of the Bank to create jurisdiction directly, but upon the fact that the Bank's status created federal questions concerning all of its acts, including its right to sue. *Id.*, at 827. Thus, petitioners' employment, without more, cannot serve as the basis for Article III jurisdiction.

The petitions also fail to raise a federal issue. Since petitioners did not assert that their charged acts (negligent driving) were justified under the laws authorizing their duties, the issue of whether they acted in their official capacity cannot be in dispute. A case cannot "arise under" a law that is irrelevant to the disposition of the action. To argue that Article III jurisdiction encompasses such acts because they were committed "within the scope of his employment" begs the question. *See e.g. Mesa*, at 968 (Noonan, J., dissenting). Assume that a mail carrier drives his truck down the sidewalk, running over pedestrians. The mail carrier's actions other than the charged act may have been committed within the scope of his employment. But the issue of whether his hitting pedestrians was within the scope of employment for purposes of a criminal action is an issue to be raised via federal defense (i.e. justification under federal law), and only then decided.

In our cases, simply stating that hitting a bicyclist (or a police car) was an act committed within the "scope of employment" does not put the laws

authorizing those duties into issue. Petitioners certainly do not contend that those laws authorized the negligent driving charged herein. (If they do, then the District Court erred by allowing removal based upon such a frivolous defense contrary to 28 U.S.C. 1446(a)(4) and (5)). Rather, petitioner Mesa alleges that the accident occurred "*while* defendant was on duty and acting in the course and scope of her employment." (J.A. 5) (emphasis added). Mr. Ebrahim's petition merely states that he was on duty. (J.A. 10). Stating that the alleged criminal act occurred while they were discharging their duties does not present a federal issue because it says nothing about why the particular charged act was committed; petitioners only tell us that they were doing other proper things when the incident occurred. "Scope of employment" in practice means nothing more than that the official was on duty.

The phrase "scope of employment" appears to have been borrowed from official immunity cases, where the official may assert a federal defense in a *civil* suit by showing that he had the discretion to commit the act by virtue of his federal authority. *See Westfall v. Erwin*, 484 U.S. __, 108 S.Ct. 580, 98 L.Ed. 2d 619 (1988). But facts which raise federal issues in such cases do not necessarily raise them in criminal actions. A simple statement that the official was on duty in a typical civil case may well raise a federal issue sufficient for removal because it actually alleges a federal defense. *See Willingham v. Morgan*, 395 U.S. 402, 409 (1969). But the same statement in these criminal cases does not raise a federal defense. Thus, federal jurisdiction is lacking.

B. This Court Should Decline Petitioners' Invitation To Adopt Protective Jurisdiction As A Basis For Federal Jurisdiction Over Traffic Tickets

This Court has not found it necessary to embrace protective jurisdiction in the more than 200 years since Article III was written. *See e.g. Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 491-93 (1983), *Northern Pipeline Construction. Co. v. Marathon Pipeline Co. and United States* 458 U.S. 50, 72-74 (1982) (rejecting federal jurisdiction based upon Article I). Petitioners invite this Court to abandon a reasonable construction of section 1442(a)(1) to create a special district court for federal employees. To accept this invitation would be unsound because the theory is suspect and the consequences unpredictable.

There appear to be two theories of protective jurisdiction. First, that Congress may provide jurisdiction over any case where it has the power under Article I to enact laws governing the outcome of that case. *See* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law and Contemporary Problems, 216, 224-25 (1948). Second, that Congress has the power to create a federal forum to protect federal "interests". *See* Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U.L. Rev. 933 (1982).

Justice Frankfurter discussed the limits of Professor Wechsler's theory.

> But, under the theory of 'protective jurisdiction', the 'arising under' jurisdiction of the federal courts would be vastly extended. For example, every contract or tort arising out of a

> contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481-82 (1956) (Frankfurter, J., dissenting).[22] Moreover, even such an all-inclusive theory does not include our cases because Congress lacks the power under Article I to enact federal criminal laws preempting those state laws which govern prosecution of ordinary traffic offenses.[23] Finally, adherents of this theory indicate that Congress provides jurisdiction by moving to

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[22] *See Northern Pipeline*, at 72-74. The majority in *Lincoln Mills* did not reach our Article III issue because it held that the challenged statute directed federal courts to fashion federal common law in that area. *Id.* Congress did not intend section 1442(a)(1) to create federal law governing suits and/or prosecutions of federal officials.

[23] The Commerce power is unaffected by the choice of forum for prosecution of federal officials for acts unrelated to federal authority. Extending jurisdiction on the basis that a guilty verdict might sideline a federal employee would extend jurisdiction to all cases involving employees arrested while off-duty. This was the result Justice Marshall chose to avoid in *Osborn*. The postal power (Art. 1, sec. 8) is also unaffected by the choice of forum for trial of mail carriers. Indeed, this Court has questioned the constitutionality of federal statutes preventing execution of state felony warrants against carriers actually *delivering* mail. *See United States v. Kirby*, 74 U.S. 482 (1868). The United States fisc cannot be affected by a guilty verdict because the United States cannot be the subject of non-mutual offensive collateral estoppel. *See United States v. Mendoza*, 464 U.S. 154 (1984).

protect its regulation of an area. *See* Mishkin, *The Federal Question in the District Courts*, 53 Colum. L. Rev. 157, at 184-96. Congress has heretofore not invaded State sovereignty over State criminal law, and has no policy concerning federal officials charged with acts unrelated to their federal authority.

The theory that Congress may provide jurisdiction based upon its "interest" in providing a federal forum for federal officials has been rejected by this Court. In *Verlinden B.V. v. State Bank of Nigeria*, *supra*, this Court noted that a jurisdictional statute could not serve as the federal statute under which the case arises under Article III. *Id.*, at 496. Since this species of protective jurisdiction is based upon a "federal interest", and not an actual federal statute, the only federal law available for the case to "arise under" would be the jurisdictional statute.

In addition, protective jurisdiction stretches the "arising under" language of Article III past the breaking point because cases would not arise under "the law and Constitution", but under "federal interests". "The law and Constitution" is definable; "federal interests" mean whatever Congress or the courts say they mean at a particular time. Moreover, the rationale behind this "forum-based" jurisdiction does not extend to the instant cases because the United States has no legitimate interest in conferring jurisdiction over federal officials acting outside of their official capacity.[24] The

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[24] *But see Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 475 (Frankfurter, J., dissenting). Justice Frankfurter argued that the limits of federal distrust of state courts had to be the Constitution as expressed by Article III (i.e. diversity jurisdiction). (continued...)

United States has no interest in providing federal jurisdiction for those who do not contend that their prosecution seeks to penalize compliance with federal law or obstruct the operations of the United States.

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[24](...continued)
As part of that argument, he discussed section 1442(a)(1). He first properly distinguished the removal statute by finding that the statute had been interpreted as requiring a federal defense. *Id.*, at 475 n. 5 ("that put federal law in the forefront as a defense") (interpreting *Tennessee v. Davis*, *supra*). Thus, petitioners receive no comfort from Justice Frankfurter.

However, Justice Frankfurter also attempted to provide an alternate, and incorrect, rationale accounting for section 1442(a)(1). "In any event, the fact that officers of the Federal Government were parties *may* be considered sufficient to afford access to the federal forum. *See In re Debs*, 158 U.S. 564, 584-86 (1895); Mishkin, 53 Col. L. Rev., at 193: 'Without doubt, a federal forum should be available for all suits involving the Government, its agents and instrumentalities, regardless of the source of the substantive rule.' " *Lincoln Mills*, at 482 n.5. (emphasis added).

Justice Frankfurter's use of the word "may" indicates some uncertainty about this pronouncement. In addition, he appears to have misinterpreted the quotation from Professor Mishkin's article as referring to federal officials instead of government agencies. *See Mishkin*, *supra*, at 193. Or Justice Frankfurter may have assumed that federal officials would be acting in their official capacities when suing or being sued. *Id.* He appears not to have considered the possibility that the official might have been on duty but acting outside of his official capacity (i.e. without a federal defense). Thus, Justice Frankfurter's only support for that statement (aside from Mishkin) was *In re Debs*, *supra*, which held that Congress could apply to the courts for an injunction against activities interfering with its Article I powers over interstate commerce. *Id.*

IV.
THIS COURT SHOULD REFUSE TO CREATE A SPECIAL FEDERAL COURT FOR FEDERAL EMPLOYEES AT THE EXPENSE OF STATE SOVEREIGNTY

This case turns on the proper construction of a statute. Petitioners' reliance on policy considerations is misplaced because the intent of Congress is clear. However, since petitioners invoke federal interests in support of removal, California urges that allowing removal would burden the federal courts at the expense of State sovereignty.

> The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions."

Kelly v. Robinson, 479 U.S. __, 107 S.Ct. 353, 360 (1986) (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)). This Court should not abrogate that policy by insulating federal employees from State judicial process where there is no challenge to federal authority.

The instant cases are excellent examples of why this Court should not construe section 1442(a)(1) to allow removal to all on-duty employees. Both are traffic cases; one is a simple traffic ticket. These cases were removed even though petitioners do not allege local or State hostility to mail carriers or federal law. Many federal officials will seek to remove such cases, not because of concerns over harassment, but to gain a tactical advantage.

For example, in California and other large states, the distance between a particular county and the nearest federal court may be measured in hundreds of miles.[25] Very few county prosecutors can afford to spend the time and money necessary to contest minor infractions in federal court. Fewer witnesses will be willing or able to travel long distances. Many offenses may be dismissed or compromised because prosecutions have been removed.

Removal in inappropriate cases injures Federal and State governments. Federal courts will be burdened with hundreds or thousands of new cases each year presenting no issues of federal law, including traffic tickets. *Pro se* litigants with distinctive and uninformed views about our Constitution and legal system can be expected to make a federal case out of a traffic ticket.

The spectacle and expense of a separate criminal court for federal employees are themselves good reasons for restricting removal. But such cases will also generate numerous appeals because there is little guidance available concerning the trial of removed cases in federal courts. It appears that district courts are forced to provide most protections available under State law to criminal defendants even where those protections conflict with federal criminal procedure. *See City of Aurora v. Erwin*, 706 F.2d 295 (10th Cir.

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[25] In California, the county seat of Del Norte County is Crescent City. Crescent City is in the Northern District of California. The nearest federal court within that district is over 350 miles away in San Francisco. Many other county seats are located over 100 miles away from their respective federal district courts.

1983) (reversing conviction because defendant was not afforded a jury trial guaranteed under Colorado law). Conflicts between federal and state criminal procedure will raise issues of first impression and create errors requiring reversal or retrial. Differences between federal procedure and procedure mandated by each of the fifty States' constitutions concerning, *inter alia*, discovery, voir dire, and jury instructions will spawn confusion and appeals.[26]

Finally, petitioners urge that section 1442(a)(1) and the federal defense requirement will disrupt "federal government functions" and leave officials vulnerable to harassment by States hostile to federal authority. But federal officials alleging harassment have effective remedies. This Court allows federal officials to obtain removal by pleading the facts suggesting harassment. As discussed above, the official need only show that

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[26] Any State retaining independent and adequate state grounds based upon its constitution may present conflicts with federal criminal procedure. State Supreme Courts have handed down at least 450 decisions based upon State constitutions which conflict with federal law, and the majority of those decisions involve criminal cases. Collins, Galie, Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 Hastings Const. L.Q. 599, 613 (1985-86), Wermiel, *State Supreme Courts Are Feeling Their Oats*, Wall St. Journal, June 15, 1988, at 1, col. 1, (updating the Hastings article), Collins and Galie, State Constitutional Law Insert to The National Law Journal, September 29, 1986, S-8 (listing some of those cases sorted by category). Moreover, the definition of state "substantive law" may encompass state statutes, as well as State constitutional provisions. *See Virginia v. Felts*, 133 F. 85 (C.C. Va. 1904) (suggesting that State rules of evidence, voir dire, and sentencing must prevail over federal law).

his actions were in enforcement of, or compliance with, federal law and negate the possibility that he was prosecuted for an act unprotected by federal law. *See Soper (No. 1)*, *supra*, at 33-34. Congress can amend section 1442(a)(1) if this standard is considered too burdensome. *See e.g. Maryland v. Soper (No. 2)*, 270 U.S. 36, 43-44 (1926). Finally, the Ninth Circuit below specifically stated that it might have allowed removal had petitioners alleged harassment. *Mesa*, *supra*, at 967.

Moreover, the writ of *habeas corpus* is an equally potent weapon against harassment. *See* 28 U.S.C. 2241(c)(2) and (c)(3). *See In re Neagle*, 135 U.S. 1 (1890). Federal officials may apply for the writ before trial. *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906). Instead of having to prevail at an evidentiary hearing and again at trial (*see* 28 U.S.C. 1446(a)), the successful official is released immediately after the hearing on the writ. *Id.* The official need only show that the prosecution was motivated by animus toward the performance of federal duties. *See e.g. People of the State of California v. Morgan*, 743 F.2d 728, 731 (9th Cir. 1984). Thus, this Court's decision reaffirming the federal defense requirement will not affect the remedies available to federal officials claiming harassment.

In sum, requiring a federal defense for removal preserves Congressional intent and over 100 years of this Court's precedent. Affirming the judgment below will protect the legitimate interest of the United States in ensuring enforcement of federal law without invading State sovereignty.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The criminal charges in this case stemmed from accidents involving petitioners that occurred while petitioners were "on duty and acting in the course and scope of [their] employment with the Postal Service" (J.A. 5). It is our contention that the plain

language of 28 U.S.C. 1442(a)(1) permits petitioners to remove their prosecutions to federal court. Each petitioner is an "officer of the United States * * * or person acting under him" against whom a "criminal prosecution [has been] commenced in a State court" for an "act under color of such office" (28 U.S.C. 1442(a)(1)). Driving a postal truck is an integral part of a postal worker's official duties; he is authorized to drive that truck only because he is a postal employee and he may do so only in the course of delivering the United States mail. It follows that the employee drives the truck "under color of" his office as a postal worker.

1. Respondent and the court below would read into Section 1442(a)(1) a requirement of federal law justification for the challenged conduct that goes far beyond a showing that the suit arose from actions taken within the scope of the employee's authority. While all agree that removal is unavailable unless the performance of one's responsibilities as a federal employee is somehow challenged by the state proceedings, respondent and the court of appeals would require further that the defendant employee invoke an explicit federal law defense—most commonly, that the conduct as alleged by the State is authorized by federal law. They would require, in other words, that vehicular homicide, speeding and failure to yield be, in the circumstances of the individual case, authorized by federal law. See, *e.g.*, Pet. App. 10a ("the removal petitions here do not allege that the acts complained of were justified by the officers' duties under federal law"); Resp. Br. 40 ("petitioners did not assert that their charged acts (negligent driving) were justified under the laws authorizing their duties").

One can imagine a federal law setting high speed limits for postal workers delivering the mail, and purporting to preempt any lower state limits, to which a postal worker prosecuted for speeding could point as a specific justification for his actions. But there is no requirement, nor can one plausibly be read into Section 1442(a)(1), that the employees' actions be justified by federal law in this sense. The term "color" implies the *appearance* of a right, authority or office, such as any federal employee enjoys when he is performing official duties, whether his actual performance of those duties is justified by federal law or not. Section 1442(a)(1) is not limited to employees "with a defense based on federal law," and the words "under color of office" will not bear such weight.

Respondent makes no attempt to come to grips with the actual language of Section 1442(a)(1). Nor does respondent satisfactorily explain the fact that similar language in the contemporaneously enacted civil rights laws has always been interpreted in a broad way. Indeed, the phrase "under color of state law" in those statutes is understood expressly to negate the requirement that the actions in question be justified by law. See *West* v. *Atkins*, No. 87-5096 (June 20, 1988), slip op. 7 (construing 42 U.S.C. 1983); *United States* v. *Classic*, 313 U.S. 299, 326 (1941) (construing predecessor of 18 U.S.C. 242). Respondent contends (Br. 20) that the policies underlying Section 1442(a)(1) differ from those underlying the civil rights statutes and that a restrictive reading "makes sense" in the former context but not the latter. But, as we explained in our opening brief (at 28-31), the policies underlying Section 1442(a)(1) fully support a reading of the statute as broad as that of Sections 242 and 1983.

2. In lieu of any discussion of the precise language used in Section 1442(a)(1) and the contemporaneous civil rights statutes, respondent cites two subsequent statutes as evidence that Congress "refuted petitioners' vision of federal official removal" (Br. 19). Respondent relies (Br. 14-16) first on Section 1442(a)(3), which permits a court officer to remove civil and criminal actions "for or on account of any act done under color of his office or in the performance of his duties as such officer." Respondent contends that "[p]etitioners' reading of 'under color of office' as referring to all acts in performance of duties not only renders section 1442(a)(3) superfluous as read today, but makes no sense historically." Respondent argues (Br. 14-15) that the "performance of duties" clause of Section 1442(a)(3) is in fact broader than the "under color of office" language.[1]

Section 1442(a)(3) was one of a number of specialized removal provisions adopted as extensions of the Force Bill of 1833, which itself applied only to officers acting under color of the revenue laws. In a series of enactments, Congress extended the right of removal to collectors of the internal revenue (1864), to persons acting under color of the Elective Franchise Act (1871), to officers of either House of Congress (1875), to court officers (1916), to soldiers in the military service (1916), and to prohibition officers (1919). Pet. Br. 13-14. All these specialized removal provisions were rendered superfluous by Congress' decision in 1948 to extend removal protection "to [a]ny officer of the United States or any agency thereof,

[1] It is unclear, however, what distinction in meaning respondent would draw between the two phrases, since it hastens to note (Br. 15) that "even the broader phrase requires reliance upon federal authority."

or person acting under him." The fact that subsection (a)(3)—like subsection (a)(4), which applies to officers of either House of Congress—remains in the statute books as historical "residue" of these earlier enactments (see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1057 (3d ed. 1988)) should not affect the proper reading of subsection (a)(1).

In any event, Congress intended, as this Court has already concluded, that the phrases "in the performance of his duties" and "under color of office," both of which appear in subsection (a)(3), have the same meaning. In *Gay* v. *Ruff*, 292 U.S. 25, 38 (1934) (quoting H.R. Rep. 776, 64th Cong., 1st Sess. 2 (1916)), the Court noted that the present subsection (a)(3) (formerly Section 33 of the Judicial Code) was designed to give United States marshals executing process " 'the same protection in all cases given to officers acting under the revenue laws' " by a different section containing only the "color of office" language now in subsection (a)(1).

The second statute upon which respondent relies is the Federal Drivers Act, 28 U.S.C. 2679, which, respondent contends (Br. 19), "provides for removal of civil suits against federal drivers upon certification by the Attorney General that the incident occurred while the official was performing his duties." Respondent maintains (*ibid.*) that this statute "was necessary because section 1442(a)(1) does not allow removal in the absence of a federal defense," and that it "would be superfluous under petitioners' construction of section 1442(a)(1)." Respondent, however, has simply mischaracterized the statute.

The Federal Drivers Act provides an exclusive remedy against the United States "for injury or loss

of property or personal injury or death, resulting from the operation by an employee of the Government of any motor vehicle while acting within the scope of his office or employment" (28 U.S.C. 2679 (b)). The removal of such suits to federal court and the substitution of the United States as defendant are mandated by the Act (28 U.S.C. 2679(d)). The purpose of the statute was not to require removal of civil suits against federal employees, which of course was already permitted by Section 1442(a)(1), but rather to transform such suits into suits against the United States under the Federal Tort Claims Act. Removal is required because tort claims against the United States are within the exclusive jurisdiction of the district courts (28 U.S.C. 1346(b)).

3. As noted, respondent and the court below would permit removal only when the defendant attempts to justify under federal law the specific conduct alleged by the State. In our opening brief (at 15-25), we showed that such a reading of the statute is refuted by this Court's repeated admonition, in both civil and criminal cases, that a federal official need not admit having done the act charged in order to obtain removal. See, *e.g.*, *Maryland* v. *Soper (No. 1)*, 270 U.S. 9, 33 (1926) ("It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution."); *Cleveland, C. &c. R.R.* v. *McClung*, 119 U.S. 454, 461 (1886) ("the right to a removal is not taken away because the [federal official] says in his defense that the act charged was not in fact done").

Respondent attempts (Br. 24-35) to accommodate these cases by expanding its conception of the prerequisite "federal defense" to include a federal official's denial that he committed the charged acts. Respondent contends (Br. 25) that a state law prosecution that, "either deliberately or mistakenly, [is] based solely upon the official's performance of federal duties * * * would in effect penalize compliance with federal law and violate the Supremacy Clause." "The Supremacy Clause," respondent further contends (*ibid.*), "would then supply the federal defense justifying removal." Thus, when a federal employee performing official duties denies that he violated state law, his "denial *is* the allegation of a federal defense" (*ibid.* (emphasis in original)).

This expanded conception of the "federal defense" requirement amounts to a confession of error. For the implication of respondent's position appears to be that a federal employee acting within the scope of his official duty can obtain removal simply by pleading not guilty to the state charges, whether the assertain of innocence is based on any explicit federal law defense or simply on a denial of the alleged wrong. Since petitioners pleaded not guilty they are, on this theory, entitled to removal.

Respondent tries to backpedal from this result by contriving (Br. 28-29) a three-part test for removal by those who claim to be innocent of the charges against them: "the official must demonstrate that: 1)he committed no acts other than those required by his duties; 2) there was a discernible reason for his prosecution, even though based upon mistake (or animus toward federal authority); and 3) the reason was connected with his having been present carrying out his duties at the time the charged act was allegedly committed." Respondent then asserts (Br. 29), without explanation, that "[p]etitioners fail to meet this test."

In fact, petitioners clearly do meet this test. (1) Driving postal trucks in the course of delivering the mail are "acts * * * required by [petitioners'] duties" and there are no other acts upon which their prosecutions are based.[2] (2) There is a discernible reason for their prosecution: each was involved in an accident, and the State claims petitioners were at fault. Petitioners claim the State is mistaken. (3) The reason for the prosecution (*i.e.*, the accident) is connected with each petitioner's having been present carrying out his duties (*i.e.*, driving a mailtruck on the public highways) at the time the charged act was allegedly committed.[3]

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[2] It is true that "negligent driving" is not required by their duties (Br. 40), but respondents have pleaded not guilty to that charge and their assertions of innocence must be taken at face value for purposes of judging the propriety of a removal motion. Although respondent says (Br. 28) that the official must "demonstrate" that "he committed no acts other than those required by his duties," respondent surely does not mean to suggest that a trial on the merits is necessary as a prerequisite to removal.

[3] Respondent cautions (Br. 29 n.13) that the connection required here is not mere "but for" causation; rather "[t]he official must demonstrate that his mere presence enforcing or executing federal law was the proximate cause of the prosecution." It is unclear what "the proximate cause of the prosecution" means in this context (as opposed to the proximate cause of the underlying accident). But if respondent intends to suggest that the federal official must demonstrate animus on the part of the charging officials that is clearly incorrect. Such a requirement is inconsistent with the language of the statute (which focuses on the actions of the federal official, not the charging officials), has been rejected by this Court (*e.g.*, *Maryland* v. *Soper (No. 1)*, 270 U.S. at 33), and would be unworkable in practice.

Respondent's three-part test would in fact be satisfied by any federal official, performing his official duties within the scope of his authority, who pleaded not guilty to the charges against him. It follows that we can simply jettison this artificial gloss on the plain terms of the statute and frankly acknowledge that officials acting in the performance of their federal duties, and not simply "in the ambit of their personal pursuits" (*Screws* v. *United States*, 325 U.S. 91, 111 (1945)), are acting "under color of" their offices as federal employees within the meaning of Section 1442(a)(1).

4. Respondent offers analyses of a number of this Court's cases, said to support the proposition that removal has never been recognized except where the defendant intends to offer a federal defense. Many of these decisions are discussed at length in our opening brief (at 16-25). Neither those cases, nor any of the others raised presently by respondent, are inconsistent with the removal of state criminal prosecutions of federal employees based on conduct—whether proper or not—that comes within the scope of their employment duties. On the contrary, a number of the cases cited by respondent draw a rather clear distinction, turning on whether the state charges arise from actions within the scope of the defendant's duty and authority as a federal employee.

In *Gay* v. *Ruff*, *supra*, the Court denied removal, under the predecessor of the current subsection (a)(3), to a court-appointed receiver for a railroad, in a suit alleging negligent operation of a train by railroad employees. The Court was obviously struck by the distinction between the role of a receiver, who is appointed to manage private assets under the indirect supervision of the court, and that of more typical

"officers of the court," who serve process, execute court orders, and generally act as an enforcement arm of the court. As the Court put it, this suit "does not relate to any operation of the federal government." 292 U.S. at 34. Unlike other "officers of the court," the receiver "is not entrusted * * * with the service or execution of any process of the court" (*id.* at 39). Thus no challenge to the exercise of federal governmental authority was in issue.[4]

Other cases, as well, evidence a clear understanding that the purpose and rationale of the removal statute is to provide a means by which the federal government can take from state courts, as it deems necessary, decisions about the propriety of actions of federal employees within the scope of their authority —whether or not such actions are ultimately found appropriate. See, *e.g.*, *Willingham* v. *Morgan*, 395 U.S. 402, 408 (1969) ("The question, then, is whether petitioners adequately demonstrated a basis for removal by showing that their only contact with respondent occurred while they were executing their federal duties inside the penitentiary."); *Maryland*

[4] The Court also relied (292 U.S. at 35) significantly on two distinct statutes suggesting that removal in the circumstances of that case would be contrary to congressional intentions. One statute (Act of March 3, 1887, ch. 373, § 3, 24 Stat. 553-554, as corrected by Act of August 13, 1888, ch. 866, § 1, 25 Stat. 435-436) provided that the fact that the defendant was a federal receiver should not preclude maintenance of an action against him in state court. The other statute, the Act of April 22, 1908, ch. 149, § 6, 35 Stat. 66, as amended by Act of April 5, 1910, ch. 143, § 1, 36 Stat. 291, provided that suits for injuries resulting from negligence in the operation of a railroad, although arising under a federal statute, could be brought in a state court, and if so brought, could not be removed to the federal court.

v. *Soper (No. 2)*, 270 U.S. 36, 44 (1926) (prosecutions found not removable because "[t]hese were not prosecutions * * * commenced on account of acts done by these defendants solely in pursuance of their federal authority"); *Maryland* v. *Soper (No. 1)*, 270 U.S. at 33 ("It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty."); *Davis* v. *South Carolina*, 107 U.S. 597, 600-601 (1883) ("His petition set out the necessary facts showing that the homicide which was charged against him as a crime took place while he was in discharge of his official duty.")

McKee v. *Rains*, 77 U.S. (10 Wall.) 22 (1870), cited by respondents as irreconcilable with the government's position, in fact turns on the question of the scope of the U.S. Marshal's legal duties and authority, and whether it extended to the seizure of one person's goods to satisfy the debts of another. The Court found that the Marshal was acting outside the scope of his authority as defined by Congress, and the applicable removal statute did not, at that time, allow removal by court officers based on duties defined by the court.[5] Removal could not be granted because the employee was not acting within the scope of any authority that the Court was at liberty to consider.

[5] See Resp. Br. 12 n.5. At that time, the applicable statute allowed removal only on the basis of authority derived from the President or from Act of Congress. See *Buck* v. *Colbath*, 70 U.S. (3 Wall.) 334 (1866). Thus it is no answer that that Marshal was within the scope of his duties as defined by the court.

5. Respondent argues (Br. 36-45) that, in the absence of a defense expressly based on federal law, Congress is without power to create a federal forum for federal officials acting under color of federal law who are charged with violations of state law. This contention is without merit. Article III, Section 2 of the Constitution broadly extends the federal judicial power to "all Cases," at law or equity, "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." From the beginning this Court has construed the "arising under" grant expansively. Thus, in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 737 (1824), the Court held that any suit brought by a bank created pursuant to federal statute was a suit "arising under" federal law. Although this Court noted in *Osborn* that every action involving a federally chartered bank raises a *potential* question of federal law, it did not limit its holding to cases where such issues were present. It broadly ruled that Congress can open the doors of the federal courts to all controversies involving the legal rights of national banks. See *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 905 (1824) (holding that federally chartered bank can bring suit in federal court to enforce an ordinary contract claim).

As Professor Mishkin has observed, "[a]t the very least, [the *Osborn* case] establishes that the judicial power under the federal question clause of Article III may be brought to bear upon any litigation to which a congressionally chartered corporation is a party, though the substantive rule for decision be state-made." Mishkin, *The Federal "Question" in the Dis-*

trict Courts, 53 Col. L. Rev. 157, 187 (1953).[6] Similarly, and "[w]ithout doubt, a federal forum should be available for all suits involving the Government, its agents and instrumentalities, regardless of the source of the substantive rule" (*id.* at 193). See also *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 475 n.5 (1957) (Frankfurter, J., dissenting on other grounds) ("[T]he fact that officers of the Federal Government were parties may be considered sufficient to afford access to the federal forum.").

Thus, whatever the merits of so-called "protective jurisdiction" where private parties are concerned,[7]

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[6] Another example of such federal jurisdiction for a federally chartered corporation, not limited to cases in which the substantive rule of decision is federal, is found in 12 U.S.C. 1819 (providing, with exceptions, that "[a]ll suits of a civil nature at common law or in equity to which the [Federal Deposit Insurance Corporation] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof"). Cf. 28 U.S.C. 1346(b) (providing exclusive federal jurisdiction for tort suits against the United States, but making liability depend upon state law).

[7] Commentators have long recognized that Congress may, pursuant to its Art. I powers, provide protective jurisdiction for private parties. See, *e.g.*, *Moore's Commentary on the U.S. Judicial Code* ¶ 0.03(22), at 138 (1949); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law and Contemp. Probs. 216, 224-225 (1948); Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 20 (1957); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *supra*, at 473-478, 983-989. This Court has never held to the contrary, and a number of opinions support such jurisdiction. See, *e.g.*, *Schumacher* v. *Beeler*, 293 U.S. 367, 374 (1934) (Congress, "by virtue of its constitutional authority over bankruptcies," may vest jurisdiction in the federal district courts to hear claims asserted by bankr[illegible]y trustees, even though those claims

it is clear that Congress can act to provide a federal forum for the review—under state law—of the acts of its agents under color of federal office. "A case based on the act of a federal employee acting within the scope of his employment arises under the Constitution, which creates the authority to authorize his work, and under the laws of the United States that do authorize it, that make him a federal employee within a federal program with a federal function." Pet. App. 16a (Noonan, J. dissenting).

In *Osborn*, the need for providing the Bank of the United States with a federal forum was clear: "[T]he Bank was the object of great popular hatred and of measures of reprisal by many state legislatures. It was sadly in need of a federal haven for its litigation." Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L.J. 393, 405 (1936). Similarly, Congress in the exercise of its Article I authorities can determine that the possibility of local hostility to federal officials and federal programs requires a federal haven for federal employees charged with violations of state law. For "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 363 (1816) (Johnson, J., concurring).

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rest solely on state law and even though "diversity of citizenship" is absent); *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949) (plurality opinion) (Congress, "in the exercise of its powers under Art. I," may confer jurisdiction on federal district courts to hear civil actions between citizens of the District of Columbia and citizens of the several states "regardless of lack of diversity of citizenship" within the meaning of Art. III); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 459-460 (1957) (Burton, J., with Harlan, J., concurring) ("the constitutionality of [a statute permitting federal courts to adjudicate collective bargaining disputes 'without regard to the citizenship of the parties'] can be upheld as a congressional grant to Federal District Courts of what has been called 'protective jurisdiction' "); *id.* at 483-484 (Frankfurter, J., dissenting) (Congress may grant federal courts jurisdiction over non-federal claims based on "the presence of some substantial federal interest").

6. Underlying all of respondent's arguments is the assumption (see, *e.g.*, Br. 9, 44-45) that federal interests are simply not implicated when a federal official is charged with acts unprotected by federal law. We disagree, and the disagreement goes to the heart of this case. Whenever a federal official is charged with a state crime for actions within the scope of his employment, the prosecution poses a challenge to the manner in which the official has performed his duties. That challenge is no less where the official responds that he did not do the act charged than where he claims that his behavior is shielded by an official privilege or immunity.

Suppose, for example, an FBI agent investigating violations of the Civil Rights laws by local authorities is arrested for drunk driving while engaging in surveillance. His defense is that he had not drunk any alcohol and is completely innocent of the charges; he was simply doing his duty pursuant to federal law and is being interfered with in the performance of that duty by some of the very local officials that he is investigating. Clearly, there is a sufficient federal interest in the case to support removal to federal court. But that federal interest does not depend on the existence of a federal defense. Nor does it depend on a pre-removal determination that the agent is in-

nocent of the charges or that his prosecution is motivated by local animus. Whether the criminal charges in any given case are justified or unjustified cannot be known until after a determination on the merits of the case. Regardless of the ultimate outcome, the federal government has a strong interest in providing a federal forum in which such issues can be resolved without "interference by hostile state courts." *Willingham* v. *Morgan*, 395 U.S. at 405.

It is respectfully submitted that the judgment of the court of appeals should be reversed.

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